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No. 08-1

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In The

Supreme Court of the United States

KEN SWINDLE,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

On Petition For A Writ Of Certiorari To The Arkansas Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

DO FOURTEENTH AMENDMENT GUARANTEES OF DUE PROCESS AND EQUAL PROTECTION FORBID A STATE TO DENY A CRIMINAL DEFENDANT'S RIGHT TO DIRECT APPEAL ON THE GROUND OF MOOTNESS BECAUSE HE HAD ALREADY SERVED HIS SENTENCE?

PARTIES TO THE PROCEEDING

The parties to the proceeding are Ken Swindle, Petitioner, who is a citizen and resident of the State of Arkansas, and the State of Arkansas, Respondent.

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PETITION FOR A WRIT OF CERTIORARI

Ken Swindle respectfully petitions for a writ of certiorari to review the judgment of the Arkansas Supreme Court in this case.

OPINIONS BELOW

The opinion of the Arkansas Supreme Court is reported at *Swindle v. State*, 373 Ark. 519, ___ S.W.3d ___, 2008 LEXIS 381, 2008 W.L. 2205518 (Ark. 2008), *reh'g denied,* 2008 Ark. LEXIS 456, ___ W.L. ___ (Ark., 9-18-08), and was a final order from which comes this appeal. That court's denial of the rehearing request brings the Petitioner before this Court since the State Supreme Court's ruling means that an attorney's release from incarceration with a conviction of criminal contempt renders moot and prevents the consideration of federal constitutional issues. This ruling impacts not only the Petitioner but others in the state judicial system.

JURISDICTION

The judgment of the Supreme Court of the State of Arkansas denied a requested rehearing on the specific issue of whether a release from incarceration for criminal contempt rendered moot the attorney's challenge to his conviction as a violation of his federal constitutional due process guarantees. The court's

decision denying rehearing was entered on September 18, 2008. The jurisdiction of this Court rests upon 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2111:

> "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

U.S. Const. art. 3, § 2, cl. 3:

> "The Trial of All Crimes, except in cases of impeachment, shall be by Jury."

U.S. Const. amend. V:

> "No person shall . . . be deprived of life, liberty or the pursuit of happiness without due process of law."

U.S. Const. amend. VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to

have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

U.S. Const. amend. XIV:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ark. Code Ann. § 16-10-108:

"(a) Every court of record shall have power to punish, as for criminal contempt, persons guilty of the following acts and no others:

" . . .

"(3) Willful disobedience of any process or order lawfully issued or made by it.

" . . . .

"(b)(1) Punishment for contempt is a Class C misdemeanor."

Ark. R. Cr. P. 31.1:

"No defendant in any criminal case may waive a trial by jury unless the waiver is assented to by the prosecuting attorney and approved by the court."

Ark. R. Cr. P. 31.2:

> "Should a defendant desire to waive a trial by jury, he may do so by either: (1) personally in writing or in open court, or (2) through counsel if the wavier is made in open court and in the presence of defendant. A verbatim record of any proceedings at which a defendant waives his right to trial by jury in person or through counsel shall be made and preserved."

STATEMENT OF THE CASE

Petitioner Ken Swindle was charged by a state trial court judge *sua sponte,* without notice, with criminal contempt, for failing to comply with the judge's requirement of giving 48-hours written notice if Petitioner desired a jury trial in a criminal case for which Petitioner was representing a client. The Arkansas Court of Appeals, its intermediate appellate court, had previously declared this requirement by the same judge improper in 1994, in *Reaser v. State*, 47 Ark. App. 7, 883 S.W.2d 851 (Ark. Ct. App. 1994). Petitioner challenged the court order in pleadings that he filed prior to the hearing, on September 10, 2007, where he noted that he was asserting his client's rights under the United States Constitution. When Petitioner appeared with his client for trial that morning, the judge put Petitioner in jail without notice of the contempt charges levied in the hearing, due to failure to give a written notice of his jury trial

demand for the criminal defendant who Petitioner was representing. This was by definition criminal contempt since the punishment was punitive, as opposed to coercive. *E.g.*, *Flight Engineers Int'l Assoc. v. Eastern Airlines, Inc.*, 301 F.2d 756, 759 (5th Cir. 1962) (noting where sanction is punitive, it is for criminal contempt). *Accord, In Re Kave*, 760 F.2d 343, 351 (1st Cir. 1985) (reversing contempt findings levied against attorney and that noting criminal contempt sanctions are designed to punish for past violations of a court order). One does not hold the "keys to the jailhouse" in a conviction for criminal contempt, in that he or she cannot obtain their release by taking some affirmative action. The punitive nature of Petitioner's jailing is reflected in the transcript below:

> "The Court: Well, I regret that, Mr. Swindle. I'll tell you what, this case is set for Trial today. You understand how this process works, and in my view, you are in contempt of this Court for not complying with the way we do things here, and for not requesting a jury way before today.
>
> Mr. Swindle: It is requested in my pleadings, Your Honor.
>
> The Court: Well, we haven't received any of your pleadings. There's nothing. You are in contempt of this Court. I'm gonna put you in jail for 24 hours, then you can the next time around – and I'm gonna reset this matter for November 21. And if you want Motions heard, you can file Motions and you

> address these issues the proper way. So you have a seat over there, Mr. Swindle."

Hearing of September 10, 2007, Petitioner's Brief, **R. 67, Ab. 4**.

Petitioner was taken, in handcuffs, from the courtroom, where he was representing his client. The lower court judge ordered Petitioner to jail for 24 hours, after which the Petitioner was released. He appealed, but the Arkansas Supreme Court ruled that Petitioner's challenge to his conviction has been mooted since he served the 24-hour sentence, writing:

> "As a preliminary matter, we must address the State's argument that this appeal is moot and should be dismissed. The State asserts that this court cannot entertain any of Swindle's challenges to the circuit court's order of contempt because his appeal is moot due to the fact that he has already served his sentence of confinement. Swindle contends that, notwithstanding the fact that he has served his sentence, the court should address his arguments because the circuit court's use of an unconstitutional order is a wrong that is likely to reoccur. . . . In the instant case, we agree with the State that the question of whether the circuit court erred in holding him in contempt is moot. However, because one of the bases for holding Swindle in contempt was his failure to request a jury trial 48 hours before trial is an issue capable of repetition, but that evades review, we find it

> necessary to address the propriety of that portion of the circuit court's order."

373 Ark. at 522-23.

The Arkansas Supreme Court ruled that the lower court judge's order was in error by requiring written notification of a jury demand at least 48-hours in advance of trial. However, it refused to consider Petitioner's appeal from his conviction of criminal contempt, a misdemeanor. Ark. Code Ann. § 16-10-108. The Arkansas Supreme Court considered the conviction moot.

The question which arises is whether involuntarily serving a sentence for a criminal contempt conviction prevents the Petitioner from challenging his conviction which occurred without rudimentary due process and in denial of equal protection rights under the United States constitutional guarantees. Petitioner was denied the opportunity for counsel, denied the right to present witnesses and refused a jury trial, in violation of the United States Constitution as applied to the states by the Fourteenth Amendment. Absent an appeal, he is left without redress and is left with a criminal contempt conviction which has collateral consequences.

The federal constitutional arguments below were raised in motions filed in the trial court before the contempt hearing. In those motions, Petitioner objected to the trial court judge's 48-hour written notice requirement mandated in order for his criminal defense client to have a jury trial. The trial court

previously transmitted by facsimile its letter order requiring this written notification of a jury trial request, **R. 12, Add. 8**, to which Petitioner challenged the notice by raising federal constitutional issues, in his "Motion to Continue and Objection to Notice," **R. 10, Add. 6**, his second objection, **R. 17, Add. 12**, and further a third objection of record. The third objection was filed after the contempt hearing below. **R. 93, Add. 44.**

Appearing for the trial of his criminal defense client, Petitioner demanded a jury trial. The trial court judge said "that is not the way we do things here," and Petitioner was led from the courtroom in handcuffs, to jail, without any opportunity to retain counsel, to prepare a defense or have his own jury trial. Petitioner had previously never been held in contempt nor had he been in a jailhouse except in meeting a client.

Criminal contempt in Arkansas is a Class C misdemeanor. Ark. Code Ann. § 16-10-108.

> Petitioner in this case was himself denied the right to a jury trial which he was asserting for his client. The judge found Petitioner guilty of a crime on-the-spot without a trial and with no opportunity to put on witnesses in his own defense. Petitioner was found guilty of a crime without any notice, opportunity to have legal counsel or have his case heard by a jury.

Petitioner filed a motion seeking reconsideration of the contempt order in the trial court, whereby Petitioner noted that his own request for a jury trial was guaranteed by the federal constitution. Petitioner's brief cited *Sacher v. United States*, 343 U.S. 1, 8, 72 S. Ct. 451, 455, 96 L. Ed. 717, 723 (1952), for the proposition that summary punishments are disfavored, and constitutional protections apply.

He continued these arguments on appeal. *See* Petitioner's Brief to the Arkansas Supreme Court, Arg. 15-16 (citing *In Re Oliver*, 333 U.S. 257, 275-76, 68 S. Ct. 499, 508-09, 92 L. Ed. 682, 695 (1948), and *Sacher, supra*). These rights follow the safeguards in all cases of non-observed contemptuous conduct. Fed. R. Crim. P. 42(b). **R. 22, Add. 14, R. 57, Add. 36.**

Petitioner filed an appeal and stated that the trial court erred in holding the Petitioner in contempt, without giving the Petitioner any opportunity to prepare to meet the charges, to retain his own attorney, or present evidence before a jury, were in violation of his federal constitutional guarantees.

The Arkansas Supreme Court refused to consider the asserted violations under the United States Constitution which resulted in the Petitioner's criminal contempt conviction. Instead, the Arkansas appellate court reasoned that the Petitioner's appeal was moot due to his release from incarceration. Petitioner filed a request for reconsideration before the Arkansas Supreme Court, and specifically noted the collateral consequences of his criminal contempt

conviction, citing the Arkansas appeals court to this Court's decisions and others in noting his federal constitutional guarantees.

Petitioner relied upon *Carafas v. LaVallee*, 391 U.S. 234, 237-38, 88 S. Ct. 1556, 1559, 20 L. Ed. 2d 554, 558 (1968); *Leonard v. Hammond*, 804 F.2d 838, 842 (4th Cir. 1986); *United States v. Schrimsher*, 493 F.2d 842, 844 (5th Cir. 1974); and *In Re Hatfield*, 290 Ga. App. 134, 658 S.E.2d 871, 874 (Ga. Ct. App. 2008). *See* Petitioner's Petition for Rehearing and Brief in Support, at p. 8.

The Petitioner cited this Court's decision in *Argersinger v. Hamlin*, 407 U.S. 25, 30-31, 92 S. Ct. 2005, 2009, 32 L. Ed. 2d 530, 534-35 (1972), for the proposition that one is entitled to a jury trial under the federal Constitution, notwithstanding that the maximum incarceration may be for six months. *See* Petition for Rehearing and Brief in Support, at p. 9. Petitioner asserted to the Arkansas appellate court that there were collateral consequences to his criminal conviction and that these would affect Petitioner's profession as an attorney.

The Arkansas Supreme Court denied his Request for Reconsideration with its one-sentence letter from the Arkansas Supreme Court Clerk, *Swindle v. State*, Order, 2008 Ark. LEXIS 456, ___ W.L. ___ (Ark., 9-18-08), from which comes this Petition for a Writ of Certiorari to the Arkansas Supreme Court.

The State of Arkansas continues to refuse to consider challenges to judicial contempt rulings if the

person has been released from incarceration at the time of an appeal, effectively denying people with short sentences any judicial review. *See Sharp v. Keeler*, 99 Ark. App. 42, ___ S.W.3d ___, 2008 Ark. App. LEXIS 691, 2008 W.L. 4416739 (Ark. Ct. App. 10-1-08) ("Sharp served her sentence which mooted the contempt issue.").

The appeal in this case is from the highest court in a state judicial system and raises profound issues involving the federal constitutional guarantees as intimate as the right to counsel and a jury trial. The Arkansas rule is by judicial fiat that if one is held in contempt and released, there is ordinarily no possibility of appeal. Since most appeals in the Arkansas system range from many months to a year before an ultimate decision, this effectively denies an entire class of citizens any judicial review. *See Supreme Court Time Study Chart, "Calendar Year 2007 Statistical Suppliment* [sic]," http://courts.arkansas.gov/07_calreport/index.cfm (judicial statistics concerning time frame between underlying order appealed from and appellate court decision) (last visited 12-2-08).

Petitioner seeks this Court's Certiorari. 28 U.S.C. § 1257(a). This Court should grant Certiorari on the grounds in Supreme Court Rule 10(b) and (c), as the State of Arkansas by judicial rulings violates federal constitutional rights and privileges, which is in direct violation of this Court's judicial directives that an appeal may be considered even if one is released from

incarceration in cases involving collateral consequences and also in violation of constitutional guarantees.

REASONS FOR GRANTING THE PETITION

I. THE FOURTEENTH AMENDMENT GUARANTEES OF DUE PROCESS AND EQUAL PROTECTION FORBID A STATE TO DENY A CRIMINAL DEFENDANT'S RIGHT TO DIRECT APPEAL ON THE GROUND OF MOOTNESS BECAUSE HE HAD ALREADY SERVED HIS SENTENCE. THE ARKANSAS SUPREME COURT'S DECISION CONFLICTS WITH DECISIONS BY THIS COURT AND OTHERS THAT A CRIMINAL CONVICTION IS NEVER MOOT.

A. THE PETITIONER'S CRIMINAL CONTEMPT CONVICTION, A MISDEMEANOR, IS NOT MOOT SINCE IT HAS COLLATERAL CONSEQUENCES.

The reason that this Court should grant certiorari in this case is that the Arkansas Supreme Court continues to follow the misguided principle to disallow a criminal defendant an appeal because he had been released from incarceration. This affects not only this Petitioner but others, who are thereby denied constitutional due process and equal protection rights of the United States Constitution, as applied to the States by the Fourteenth Amendment. A criminal conviction, particularly where it is to an attorney's unblemished record, is never moot. There

are collateral consequences justifying appellate review which should not be denied because a sentence is too short for one to remain incarcerated pending appeal. This Court recognized in 1968, in an opinion written by Chief Justice Warren, that:

> "Many deep and abiding constitutional problems are encountered primarily at a level of 'low visibility' in the criminal process – in the context of prosecutions for 'minor' offenses which carry only short sentences. We do not believe that the Constitution contemplates that people deprived of constitutional rights at this level should be utterly remediless and defenseless against repetitions of unconstitutional conduct. A State may not cut off federal review of whole classes of such cases by the simple expedient of a blanket denial of bail pending appeal. As *St. Pierre* [*St. Pierre v. United States*, 319 U.S. 41 (1943)] clearly recognized, a State may not effectively deny a convict access to its appellate courts until he has been released and then argue that his case has been mooted by his failure to do what it alone prevented him from doing."

Sibron v. New York, 392 U.S. 40, 53-54, 88 S. Ct. 1889, 1897-98, 20 L. Ed. 2d 917, 929 (1968).

In *Bloom v. Illinois*, 391 U.S. 194, 88 S. Ct. 1477, 20 L. Ed. 2d 522 (1968), this Court considered a contempt conviction for an attorney, noting that it is "indistinguishable from ordinary criminal convictions." The Supreme Court ruled that the attorney

had a right to a jury trial to decide if he was guilty of criminal contempt, where he was sentenced to 24 months. The Opinion observed that: "Criminal contempt is a crime in the ordinary sense. It is a violation of the law, a public wrong which is punishable by fine or imprisonment or both." 391 U.S. at 201; 88 S. Ct. at 1481-82; 20 L. Ed. 2d at 528. The Court noted that except in cases of contempt committed before the judge in open court, due process requires that the defendant should be advised of the charges and have a reasonable opportunity to prepare. Minimum due process includes the right to retain counsel and call witnesses in one's defense. 391 U.S. at 205; 88 S. Ct. at 1484-85; 20 L. Ed. 2d at 530-31. The Opinion observed that it has long noted the danger of summary findings of contempt, explaining that they are susceptible of judicial abuse. While the Court noted that a jury trial is dependent upon the sentence imposed, that 1968 decision has correctly been expanded by this Court and others, viewing real-life consequences of criminal convictions.

The seriousness and necessity for an avenue of judicial review should not, and cannot, be ignored by a state court, as the Arkansas appellate courts continue to follow, when one is released from a short incarceration.

This Court's more recent decisions have ruled that the mere "possibility" of collateral consequences justifies the United States Supreme Court in hearing a case. *E.g.*, *Benton v. Maryland*, 395 U.S. 784, 790, 89 S. Ct. 2056, 2060, 23 L. Ed. 2d 707, 713 (1969) (under the concurrent sentence doctrine); *Carafas v.*

LaVallee, 391 U.S. 234, 237-38, 88 S. Ct. 1556, 1559, 20 L. Ed. 2d 554, 558 (1968) (noting collateral consequences, may affect one's business, voting, and serving in a labor union, avoiding mootness argument, and that under federal habeas corpus statute, an appeal is not moot by having served the sentence); *Fiswick v. United States*, 329 U.S. 211, 220-22, 67 S. Ct. 224, 229-30, 91 L. Ed. 196, 202-03 (1946) (noting possibility of deportation following conviction was sufficient to avoid mootness); and *Argersinger v. Hamlin*, 407 U.S. 25, 30-31, 92 S. Ct. 2006, 2009, 32 L. Ed. 2d 530, 534-35 (1972) (holding that under the United States Constitution, one is entitled to a jury trial, notwithstanding that an offense was punishable with only six months incarceration).

This Court wrote in *Carafas v. LaVallee, supra*, that:

> "The petitioner in this case was sentenced in 1960. He has been attempting to litigate his constitutional claim ever since. His path has been long – partly because of the inevitable delays in our court processes and partly because of the requirement that he exhaust state remedies. He should not be thwarted now and required to bear the consequences of assertedly unlawful conviction simply because the path has been so long that he has served his sentence."

391 U.S. at 239-40; 88 S. Ct. at 1560-61; 20 L. Ed. 2d at 559-60.

This Court and other federal circuits have reconsidered earlier rulings such as *St. Pierre v. United States,* 319 U.S. 41, 63 S. Ct. 910, 87 L. Ed. 1199 (1943), where the Court reasoned that since the petitioner had fully served his sentence for contempt, reconsidering it would not undo any harm. In later rulings, the Court began to address collateral consequences. *See United States v. Morgan*, 346 U.S. 502, 516 n.4, 74 S. Ct. 247, 98 L. Ed. 248 (1954); *Sibron v. New York*, 392 U.S. 40, 53-54, 88 S. Ct. 1889, 1897-98, 20 L. Ed. 2d 917, 929 (1968); *Ginsberg v. New York*, 390 U.S. 629, 633 n.2, 88 S. Ct. 1274, 1277, 20 L. Ed. 2d 195, 200 (1968); *Benton v. Maryland*, 395 U.S. 784, 790-91, 89 S. Ct. 2056, 2060, 23 L. Ed. 2d 707, 713-14 (1969); and *cf., Lane v. Williams*, 455 U.S. 624, 632, 102 S. Ct. 1322, 1327, 71 L. Ed. 2d 508, 515 (1982) (distinguishing it involving violation of parole from others with collateral legal consequences). *E.g., O'Clair v. United States*, 470 F.2d 1199, 1203 (1st Cir. 1972) (in a case involving dual convictions, noting that: "Moreover, even if no other disabilities were incurred, there is always the extra stigma upon one's reputation."); *United States v. Hines*, 256 F.2d 561, 563 (2nd Cir. 1958) (noting "stigma" of conviction of multiple crimes); *United States v. Frumento*, 552 F.2d 534, 539 (3rd Cir. 1977) (collecting cases rejecting mootness argument and observing that such orders are "short-lived"); *Young v. Vaughn*, 83 F.3d 72, 77-78 (3rd Cir. 1996) (ruling a prisoner may attack a prior conviction even if he is no longer in custody); *Nakell v. Attorney General of North Carolina*, 15 F.3d 319, 322-23 (4th Cir. 1994) (ruling that attorney's criminal

contempt conviction was not moot despite paying fine and serving sentence, as collateral consequences may attach to it); *United States v. Camil*, 497 F.2d 225, 227-28 (5th Cir. 1974) (reversing criminal contempt conviction, ruling that trial court must hear or see the contemptuous conduct, and also addressing the mootness doctrine, by observing a criminal contempt conviction is only moot if there is 'no possibility' of collateral consequences, explaining *St. Pierre, supra* and *Sibron, supra*); *United States v. Schrimsher*, 493 F.2d 842, 843-44 (5th Cir. 1974) (involving an attorney's contempt where the judge ordered him to immediately go to jail, noting, "The judge on his part made it clear that Butts was going directly to jail, and that he was to be held there until 1:30 P.M. There was thus no way Butts could have secured review of his case prior to the expiration of his sentence. The doctrine of mootness is therefore inapplicable."); *United States ex rel. Grundset v. Franzen*, 675 F.2d 870, 873 (7th Cir. 1982) (finding lack of mootness because of possibility of collateral consequences of criminal conviction, citing *Sibron, supra*); *D.S.A. v. Circuit Court Branch 1*, 942 F.2d 1143, 1145-46 (7th Cir. 1991) (noting juvenile's release from custody did not render habeas corpus challenge moot, citing *Carafas, supra*); *Chacon v. Wood*, 36 F.3d 1459, 1463 (9th Cir. 1994) (ruling that habeas petition challenging the underlying conviction is never moot despite being released from custody, reasoning that collateral consequences flow from a criminal conviction); *United States v. Reider*, 103 F.3d 99, 101 (10th Cir. 1996) (rejecting mootness argument and noting where a

prisoner is released upon expiration of sentence, nevertheless the conviction may have collateral legal consequences).

See also 7 A *Federal Procedure, Lawyers' Edition* § 17.51 (2008) ("The general rule in criminal cases that an appeal taken by a defendant after he or she has served his or her sentence will not be rendered moot if collateral-legal consequences will result if the conviction is allowed to stand or, if appellate review could not be obtained before completion of the sentence, applies to convictions for criminal contempt. . . . An attorney's conviction of criminal contempt may have particularly serious ongoing consequences, so as to preclude an appeal from being considered moot, if the conviction may: (1) provide a basis for disciplinary action by a bar association; (2) foreclose opportunities for appointment or election to public office; or (3) do damage to the attorney's practice and his or her reputation in the legal community."). *See also* Comment note – *When criminal case becomes moot so as to preclude review of or attack on conviction or sentence*, 9 A.L.R. 3rd 462 (1966 & Supp. 2008). The Comment summarizes the federal rule as:

> "The federal rule that the satisfaction of a sentence renders the case moot so as to preclude review of or attack on the conviction or sentence unless, as a result of the conviction or sentence, the accused suffers collateral legal disabilities apart from the sentence, in which event the accused is held to have a sufficient stake in the conviction or

> sentence to permit him to obtain review of, or maintain a challenge to, the conviction or sentence."

Id., "Summary and comment – Generally," § 2[a].

In *United States v. Schrimsher*, 493 F.2d 842 (5th Cir. 1974), an attorney was ordered jailed for a matter of hours and was then released. The circuit court panel wisely wrote that this did not render moot his appeal from the holding that he was in contempt, reasoning:

> "Another qualification to the *St. Pierre* doctrine of mootness lends additional support to our rejection of the government's mootness argument. In *Sibron,* the Court stated that *St. Pierre* 'must be read in light of later cases to mean that a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction.' 392 U.S. at 57. Butts' conviction for contempt presumably could be used for impeachment and sentencing purposes in any future criminal proceeding. This conviction would be especially damaging if Butts were ever again accused of being in contempt of court. Conviction for contempt of court could also have serious adverse career consequences for Butts. His conviction could provide a basis for disciplinary action by a bar association. Opportunities for appointment to the bench or to other high office might be foreclosed as a result of this blot upon his record. The conviction might damage Butts' reputation in the legal community,

> and this in turn might affect his ability to attract clients and to represent them effectively, especially in open court. In light of these possible collateral consequences, Butts' appeal is not 'abstract, feigned, or hypothetical' so as to justify dismissal for mootness. See *Sibron, supra*, 392 U.S. at 57."

Id. at 844.

Another case involving contempt of an attorney, *Dailey v. Vought Aircraft Co.*, 141 F.3d 224 (5th Cir. 1988), similarly rejected challenges to the attorney's appeal. Although the attorney had been reinstated to the bar, that did not render moot the court's disbarment. There were resulting collateral consequences, the opinion observed.

> "As the 'mere possibility of adverse collateral consequences is sufficient to preclude a finding of mootness,' Collie's case was not rendered moot by her payment of the sanctions and reinstatement to practice in the Northern District of Texas. Id. (quoting *Sibron v. New York*, 392 U.S. at 55). Because admission to the appropriate bar is an absolute prerequisite to the practice of law, it is hardly inconceivable that disbarment, even if only temporary, can be detrimental to an attorney's professional reputation, well-being, and success. Collie explains in her brief that the nature of her practice results in the majority of her cases being litigated in federal court. Although she is now able to practice in the Northern District of Texas, her professional record continues to be tarnished. The

> order disbarring Collie remains of record and open to perusal by the judges and attorneys of any court before which she seeks to practice. It is reasonably foreseeable that the disbarment on Collie's record may have a detrimental impact on her professional career."

Id. at 228.

In so doing, the Fifth Circuit again noted that an attorney is entitled to due process including notice and an opportunity to be heard concerning a contempt charge. *Id.* at 229-31. *See also Walker v. City of Mesquite, Texas*, 129 F.3d 831, 832 (5th Cir. 1997) (noting attorney's professional reputation is their "most important and valuable asset," holding that monetary sanctions are not necessary for an appeal, ultimately reversing contempt finding). The Fifth Circuit in *Walker* explained how collateral consequences result in an attorney's contempt finding:

> "In the case at bar Peebles was reprimanded sternly and found guilty of blatant misconduct. That reprimand must be seen as a blot on Peebles' professional record with a potential to limit his advancement in governmental service and impair his entering into otherwise inviting private practice. We therefore conclude and hold that the importance of an attorney's professional reputation, and the imperative to defend it when necessary, obviates the need for a finding of monetary liability or other punishment as a requisite for the appeal of a court order finding

> professional misconduct. This appeal presents a reviewable appellate issue."

Id. at 832-33.

Accord, In Re Hatfield, 290 Ga. App. 134, 658 S.E.2d 871, 874 (Ga. Ct. App. 2008) (holding attorney's contempt finding was not moot due to continuing adverse consequences which he could suffer, including loss of career opportunities and clients).

The Arkansas Supreme Court, on the other hand, follows a bright-line rule that if one is released from incarceration, it will not consider their contempt appeal. *Sharp v. Keeler*, ___ S.W.3d ___, 2008 Ark. App. LEXIS 691, 2008 W.L. 4416739 (Ark. Ct. App. 10-1-08) ("Sharp served her sentence which mooted the contempt issue.").

The Arkansas Supreme Court's rule of law is out-of-step with this Court's pronouncements. The Arkansas reasoning that a litigant no longer has a justiciable controversy due to involuntarily serving a sentence is a legal theory which is a relic of the past and should be abolished particularly where an appellant's rights under the United States Constitution are concerned. This Court should hear this case and set correct standard for Arkansas to follow by redirecting its attention to this Court's pronouncements.

Once the Arkansas court upon remand hears this case, the Petitioner is confident that it will find that the trial court contempt ruling will be reversed. At

this juncture, however, due to the State court's refusal to consider whether the federal Constitution applies, the Petitioner has not been heard by that Court on the constitutional issues.

B. THE PETITIONER'S CONVICTION IS NOT MOOT SINCE IT IS CAPABLE OF REPETITION, YET EVADING REVIEW.

This Court has observed that where a challenged action by its duration is too short to be fully litigated prior to cessation or expiration, and there is a reasonable expectation that the same complaining party will be subject to the action again, it is not moot. It is "capable of repetition, yet evading review."

Lewis v. Continental Bank Corp., 494 U.S. 472, 481, 102 S. Ct. 1181, 1255, 71 L. Ed. 2d 353, 413 (1990), explained that where a party has a stake in litigation of which the underlying sentence may be too short to allow judicial review prior to completion, and where there are recurring events which are capable of repetition, mootness does not bar judicial review of the lower court decision. This Court cited *Murphy v. Hunt*, 455 U.S. 478, 482, 102 S. Ct. 1181, 1183, 71 L. Ed. 2d 353, 358 (1982) (per curiam). Petitioner's 24-hour incarceration was too short to allow an appeal to be heard, and since Petitioner continues to practice in this jurisdiction, he will likely be subjected to the same order and additional sanctions if he again challenges it in the interest of his

clients' unhampered right under the federal Constitution to a jury trial.

See generally, Federal Election Commission v. Wisconsin Right to Life Inc., ___ U.S. ___, 127 S. Ct. 2652, 2663, 168 L. Ed. 2d 329, 342 (2007) (noting that this exception need not require absolutely identity, because if it did, the exception to mootness would never exist).

The Arkansas Supreme Court declared "error" as it concerns the judge's order requiring written notification of a demand for a jury trial, much as an Arkansas appellate court did a decade ago. Opinion, 373 Ark. at 524. *See Reaser v. State*, 47 Ark. App. 7, 883 S.W.2d 851 (Ark. Ct. App. 1994). However, it refused to consider the underlying criminal conviction as it pertains to Petitioner.

The Arkansas Supreme Court in this case failed to consider whether the attorney's contempt sanction itself would be capable of repetition, yet evading review.

By affirming, the Arkansas court left a blemish on Petitioner's record which is likely to result in further disciplinary action against the same Petitioner as he continues practicing before the same judge in other cases in which the same standing order has remained intact even since the Petitioner's appeal.

C. THE PETITIONER WAS DENIED EQUAL PROTECTION UNDER THE FIFTH AMENDMENT AS APPLIED TO THE STATES BY THE FOURTEENTH AMENDMENT, WHICH CALLS OUT FOR THIS COURT'S REVIEW, DESPITE A MOOTNESS CLAIM.

If a state allows appeals in criminal cases, the appellate review must be equally and fairly given to all. This Court noted long ago that unreasoning preferences in appellate avenues will not survive scrutiny. *See generally Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1956) (which ruled that a state must not discriminate against litigants in criminal appeals, preferring those appellants with greater financial wherewithal to order a record). *Accord*, *M.L.B. v. S.L.J.*, 519 U.S. 102, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996) (applying the same principle in appeals involving a termination of parental rights).

In the instant case, Arkansas has provided for an appeal for criminal convictions. Arkansas may not provide an appeal for some people and yet deny it to others in an arbitrary and capricious and unreasoning manner. The classification created by the Arkansas decisions would deny a criminal appeal to those who are released from jail quickly. This fails to comport with equal protection under the law. This Court should grant certiorari and hear these issues.

CONCLUSION

For the aforementioned reasons, the Petitioner respectfully requests that the Petition for a writ of certiorari be granted.

Respectfully submitted,

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SUPREME COURT OF ARKANSAS
No. CR 07-1281

KEN SWINDLE, APPELLANT, VS. STATE OF ARKANSAS, APPELLEE,	**Opinion Delivered** May 29, 2008 APPEAL FROM THE WASHINGTON COUNTY CIRCUIT COURT, NO. CR 07-1443-1, WILLIAM A. STOREY, JUDGE. *AFFIRMED IN PART; ERROR DECLARED.*

JIM HANNAH, Chief Justice

Appellant Ken Swindle brings this appeal raising numerous challenges to the Washington County Circuit Court's order finding him in contempt of court and sentencing him to 24 hours' confinement in the Washington County Detention Center. The State contends that, because Swindle has already served his sentence of confinement, his appeal is moot and should be dismissed.

Attorney Swindle represented defendant Juan Lux-Lux on a charge of first-degree forgery. Swindle appeared with Lux-Lux at an arraignment in the circuit court on July 11, 2007. At the arraignment, the circuit court informed Lux-Lux that he was entitled to a jury trial. On July 12, 2007, the circuit court transmitted, by facsimile, a letter order to Swindle, notifying him that Lux-Lux's trial had been

set for September 10, 2007. Also included in the letter was the following statement: *If a jury is requested, please notify my office at least 48 hours in advance, or it will be assumed that a bench trial is sufficient or a plea will be entered on the trial date.*

On July 13, 2007, Swindle filed a Motion to Continue and Objection to Notice, on behalf of Lux-Lux. The motion stated that the 48-hour notice requirement was "ambiguous and unclear to the Defendant." Further, the motion provided that there had been no omnibus hearing in the matter and that the "Defendant [had not] waived any of his Constitutional rights." Therefore, Lux-Lux "object[ed]" to the notice sent by the circuit court. The motion also noted that Swindle had a scheduling conflict with the date set for trial. Finally, the motion requested that the trial set for September 10 be continued, that Lux-Lux be given a date for an omnibus hearing, "and for all other rights guaranteed to him by the Arkansas and Federal Constitutions." On July 16, 2007, Swindle filed an Amended Motion to Continue and Objection to Notice, on behalf of Lux-Lux. The motion stated that Lux-Lux "continue[d] to object to the setting notice of September 10, 2007, for the reasons stated in his original Motion to Continue and Objection to Notice." Additionally, the motion stated that Lux-Lux requested "all other rights guaranteed to him by the Arkansas and Federal Constitutions."

Swindle and Lux-Lux appeared in the circuit court on September 10, 2007. The following colloquy

took place between Deputy Prosecuting Attorney Chreea Stanimirovic, Swindle, and the circuit court:

MS. STANIMIROVIC: Your Honor, if I may. Defendant – I received a message at 4:05 on Friday afternoon that he was requiring a Jury Trial.

MR. SWINDLE: That is incorrect, Your Honor. Defendant's request for Jury Trial was made previously but the Prosecutor's Office is not ready to proceed. There's also been a Motion for Discovery filed in this case which has not been responded to. Also, at the Arraignment in this matter I notified the Prosecutor's Office this is the incorrect Court for this case because the Defendant is too young to be in this Court. The Prosecutor is obviously not prepared. She has misinformed this Court.

THE COURT: Well, Mr. Swindle, you've been in this Court a number of times. You have to understand that we call the juries. The Prosecutor doesn't call the juries. We have heard nothing, whatsoever, from you or your office requesting a jury. This – if you have a problem with this Defendant being charged in Juvenile Court, as you know,

or should know, you need to file a Motion to Transfer in this case which, as I understand it, there's no Motion filed?

MR. SWINDLE: There's not, Your Honor, but there's no response to the Motion for Discovery which has been filed.

THE COURT: Well, I regret that, Mr. Swindle. I'll tell you what, this case is set for Trial today. You understand how this process works, and in my view, you are in contempt of this Court for not complying with the way we do things here, and for not requesting a jury way before today.

MR. SWINDLE: It is requested in my pleadings, Your Honor.

THE COURT: Well, we haven't received any of your pleadings. There's nothing. You are in contempt of this Court. I'm gonna put you in jail for 24 hours, then you can the next time around – and I'm gonna reset this matter for November 21. And if you want Motions heard, you can file Motions and you address these issues the proper way So you have a seat over there, Mr. Swindle.

Swindle was escorted to the Washington County Detention Center, where he served a twenty-four hour term of confinement. The circuit court memorialized its findings in an order entered September 10, 2007. The circuit court found:

> That on the 11th day of July, 2007, the defendant, Juan Lux-Lux, appeared for arraignment in this cause with his attorney, Ken Swindle, at which time the defendant was arraigned on the charge of forgery in the first degree.
>
> That at the conclusion of said arraignment hearing, the defendant and his attorney, Ken Swindle, were advised that this matter was set for trial for September 10, 2007.
>
> That on the 12th day of July 2007, defendant's attorney was once again notified by way of facsimile transmission that defendant's case was set for trial September 10, 2007.
>
> That on the 10th day of September, 2007, defendant appeared with his attorney, Ken Swindle, who advised the Court that the case was filed in the "wrong court" and further, that defendant demanded a jury trial.
>
> That defendant's attorney, Ken Swindle, did not formally raise any jurisdictional issues or communicate with the Court as to the status of defendant's case prior to September 10, 2007.

> That Deputy Prosecuting Attorney Chreea Stanimirovic, on four occasions, attempted to discuss the status of defendant's case with his attorney, Ken Swindle, by telephone, which attempts were unsuccessful in that defendant's attorney, Ken Swindle, did not return Deputy Prosecutor's Stanimirovic's telephone calls.
>
> That on the 10th day of September, 2007, defendant's attorney, Ken Swindle, made unprofessional and uncivil remarks in open court relating to the deputy prosecuting attorney's representation of the State of Arkansas in this cause.
>
> That defendant's attorney, Ken Swindle, advised the Court that he had requested a jury in his pleadings, which representation is incorrect in that no such request appears in the pleadings.
>
> That defendant's attorney's conduct as set forth above constitutes a deliberate and purposeful attempt to obstruct and interfere with the orderly and efficient administration of justice, and by reason thereof, defendant's attorney, Ken Swindle, should be and is hereby found to be in contempt of this court and incarcerated in the Washington County Detention Center for a period of 24 hours.

Three days after the citation of contempt, the circuit court transmitted, by facsimile, its letter order resetting the trial for November 21, 2007. Again, the

order included the 48-hour notification requirement and, again, Swindle filed an objection to the notice.

Swindle filed a Motion and Brief for Reconsideration of the order of contempt. In his motion, Swindle noted that his client's request for a jury trial was guaranteed by the Arkansas Constitution and the United States Constitution. In addition, Swindle stated that his motions filed on July 13 and July 16, 2007, requested his client's guaranteed constitutional rights. Swindle contended that the circuit court should have given him notice of a hearing concerning the telephone calls from Deputy Prosecuting Attorney Stanimirovic because the calls did not take place in the presence of the court. As to the circuit court's finding regarding Swindle's uncivil remarks to Stanimirovic, Swindle contended that his statements were factually true, namely that there was a failure by Stanimirovic to respond to discovery and that she was unprepared for trial on September 10, 2007.

The circuit court held a hearing on the motion for reconsideration, which was denied in an order entered October 24, 2007. Swindle appeals the order of contempt and the denial of his motion for reconsideration.

As a preliminary matter, we must address the State's argument that this appeal is moot and should be dismissed. The State asserts that this court cannot entertain any of Swindle's challenges to the circuit court's order of contempt because his appeal is moot due to the fact that he has already served his

sentence of confinement. Swindle contends that, notwithstanding the fact that he has served his sentence, the court should address his arguments because the circuit court's use of an unconstitutional order is a wrong that is likely to reoccur.

The general rule regarding contempt orders is that where the terms of a contempt order have been fulfilled, the issue of the propriety of the contempt order is moot. *See Conlee v. Conlee,* 370 Ark. 89, ___ S.W.3d ___ (2007) (stating that any argument pertaining to seven-day sentence for criminal contempt was moot where appellant had completed the sentence and paid the fine associated with that contempt order); *Centr. Emergency Med. Servs., Inc. v. State,* 332 Ark. 592, 966 S.W.2d 257 (1998) (dismissing appeal from criminal contempt order as moot where emergency medical service provider paid the fine that the court imposed); *Minge v. Minge,* 226 Ark. 262, 289 S.W.2d 189 (1956) (holding that the issue of civil contempt was moot, where the party held in contempt for failure to pay child support paid the delinquent child support and purged the contempt).

This court has recognized two exceptions to the mootness doctrine. The first one involves issues that are capable of repetition, yet evade review, and the second one concerns issues that raise considerations of substantial public interest which, if addressed, would prevent future litigation. *Delancy v. State,* 356 Ark. 259, 151 S.W.3d 301 (2004). Ordinarily, mootness resolves the controversy and renders a decision unnecessary. *Owens v. Taylor,* 299 Ark. 373, 772

S.W.2d 596 (1989). But that choice is ours to make and where consideration of an issue that is capable of repetition, yet evades review, is present, we may elect to settle an issue, even though moot. *See id.*

In the instant case, we agree with the State that the question of whether the circuit court erred in holding him in contempt is moot. However, because one of the bases for holding Swindle in contempt was his failure to request a jury trial 48 hours before trial is an issue capable of repetition, but that evades review, we find it necessary to address the propriety of that portion of the circuit court's order.

The Arkansas Constitution provides that an accused in a circuit court case has a right to a trial by jury and that the right shall remain inviolate unless waived by the parties in the same manner prescribed by law. *See* Ark. Const. art. 2, §§ 7, 10. In order for a defendant to waive his or her right to a jury trial, he or she must do so personally either in writing or in open court and the waiver must be assented to by the prosecutor and approved by the court. Ark. R. Crim. P. 31.1, 31.2.

In every criminal trial where there is a right to a trial by jury, the court should proceed as if a jury were to be used unless waiver takes place in accordance with the law. *Calnan v. State,* 310 Ark. 744, 749, 841 S.W.2d 593, 596 (1992). The burden is on the trial court to assure that, if there is to be a waiver of the right to a jury trial in a criminal case, it be done in accordance with the rules by which we have

implemented our Constitution. *Id.*, 841 S.W.2d at 596. The Arkansas Constitution and the Arkansas Rules of Criminal Procedure assume a defendant will be tried by a jury unless that right is expressly waived. *Id.*, 841 S.W.2d at 596. The law providing the manner of waiver is obviously designed to assure that the jury trial right is not forfeited by inaction on the part of the defendant. *Id.*, 841 S.W.2d at 596.

We wish to make it clear that in the present case, the defendant was not denied his right to a jury trial. Nevertheless, we are troubled by the circuit court's standard practice of requiring a defendant to request a jury at least 48 hours before trial, as this practice is not in accordance with the Arkansas Constitution and our rules of criminal procedure.

The right to a jury trial is a right held by a defendant, not the circuit court. A defendant is not required to request a right to which he or she is already guaranteed. In essence, the notice requirement puts the defendant in the position of forfeiting his or her right to a jury trial due to inaction. It is not proper for the circuit court to assume that a jury trial is waived due to a defendant's inaction. Nor is defense counsel required to make this request on behalf of a defendant.

We are sensitive to the circuit court's challenges in managing its docket in an orderly fashion; however, a defendant has a fundamental right to a trial by jury, and again, any waiver of that right must be done in accordance with our Constitution and our

rules of criminal procedure. *See Reaser v. State,* 47 Ark. App. 7, 11, 883 S.W.2d 851, 854 (1994). Accordingly, we declare error as to the circuit court's use of orders requiring defendants to request a jury trial 48 hours prior to trial.

Affirmed in part; error declared.

Leslie M. Steen
Clerk

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September 18, 2008

Doug Norwood
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RE: CR 07 01281. Ken Swindle v. State of Arkansas

Dear Mr. Norwood:

The Arkansas Supreme Court made the following order today in the above styled case:

"Petition for rehearing is denied."

Sincerely,

/s/ Leslie W. Steen
Leslie W. Steen, Clerk

LWS:jko

cc: Attorney General
Brian Gene Brooks
Jeff M. Rosenzweig
Bette Stamps, Clerk
(CR07-1443-1)

OPPOSITION BRIEF

121

(2)

No. 08-773

Supreme Court, U.S.
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FEB 23 2009
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In The
Supreme Court of the United States

KEN SWINDLE,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Arkansas

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Do the Due Process and Equal Protection Clauses of the Fourteenth Amendment prohibit a state appellate court from holding that challenges to a criminal-contempt conviction are moot?

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OPINION BELOW

The State of Arkansas, Respondent, opposes the petition of Ken Swindle requesting a writ of certiorari to review the judgment of the Arkansas Supreme Court affirming his criminal-contempt conviction, but declaring erroneous the trial court's practice of entering orders requiring defendants to request a jury trial 48 hours prior to trial. That court's opinion, delivered on May 29, 2008, is published as *Swindle v. State*, 373 Ark. 518, ___ S.W.3d ___ (2008). The court summarily denied petitioner's petition for rehearing, joined by two *amici*, in an order entered on September 18, 2008.

JURISDICTION

Respondent disputes that this Court has discretionary jurisdiction to review this case pursuant to 28 U.S.C. § 1257(a) because the due-process and equal-protection claims petitioner raises in his question presented are not properly before the Court under that statute.

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent part, that no State shall "deprive any person of life, liberty, or property, without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Respondent relies on the description of the proceedings contained in the opinion below and incorporates that description by reference, Petitioner's Appendix at App. 1-7, with the following additional comments concerning petitioner's recitation of the case. Respondent disagrees with petitioner's characterization of why he was held in contempt. Although one of the reasons petitioner was held in contempt was his failure to comply with the trial court's standing order to request a jury trial for his client 48 hours before the scheduled trial date, Petition at 4-5, Petitioner's Appendix at App. 9, petitioner neglects to mention that he also was held in contempt for other reasons, including making "unprofessional and uncivil remarks in open court" about the deputy prosecutor's "representation" in the case. (R. 20-21, 66-67) More importantly for present purposes, however, respondent disputes petitioner's suggestion that the federal constitutional claims he now wants the Court to address were raised by him (or raised in due time), much less decided by the Arkansas Supreme Court. To be sure, petitioner mounted numerous constitutional challenges to the trial court's contempt order, both before that court, (R. 25-26), and on appeal, Respondent's Appendix at A7, A22-26 – such as that he had not received adequate notice of the contempt

charge and had been deprived of his right to a jury trial – but those challenges hardly amounted to claims that the Arkansas Supreme Court's holding of mootness violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

REASONS FOR DENYING THE WRIT

I. Petitioner's Federal Constitutional Claims Were Not Addressed By Or Properly Presented To The Arkansas Supreme Court.

Petitioner asks this Court to hold that the Due Process and Equal Protection Clauses of the Fourteenth Amendment "forbid" a state appellate court from holding that a criminal conviction is moot, Petition at i, 12, yet he did not precisely present the claims to the Arkansas Supreme Court or at least not in a timely manner and that court certainly did not address them. "With very rare exceptions, [this Court has] adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that [it] will not consider a petitioner's federal claim unless [the claim] was either addressed by, or properly presented to, the state court that rendered the decision [it] ha[s] been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (per curiam) (citation and quotations omitted). In order to be properly presented to the state court, a federal claim must be presented "with fair precision and in due time[.]" *Id.*, 520 U.S. at 87 (citation and quotations omitted). As a general matter, issues

"raised clearly for the first time in a petition for rehearing when the state court is silent on the question[]" are not properly presented to this Court pursuant to 28 U.S.C. § 1257. *Adams*, 520 U.S. at 89 n.3. The burden is on petitioner to show that his claims were properly presented to the Arkansas Supreme Court, *see*, *e.g.*, *id.*, 520 U.S. at 86; *see also* Supreme Court Rule 14.1(g)(i), and he has not met it here.

As respondent already has noted, petitioner did object to the trial court's contempt finding on constitutional grounds, both before that court, (R. 25-26), and in the Arkansas Supreme Court, Respondent's Appendix at A7, A22-26, but he did not clearly or timely object on due-process and equal-protection grounds to the Arkansas Supreme Court's extant case law that service of a criminal-contempt sentence moots challenges to it on appeal. The trial court found appellant in contempt and sentenced him to 24 hours of confinement on September 10, 2007, and he served his jail time immediately, without requesting a stay. (R. 65-67, 71) Before that date, on May 24, 2007, the Arkansas Supreme Court unequivocally held in *Conlee v. Conlee*, 370 Ark. 89, 96-97 & n.6, 257 S.W.3d 543, 550 & n.6 (2007), that challenges to a criminal-contempt finding are moot when the contemnor has served or satisfied the sentence imposed.

Although petitioner filed his initial brief in the Arkansas Supreme Court on February 26, 2008, he did not acknowledge *Conlee*'s holding that service of

his sentence rendered his challenge to the contempt conviction moot. Respondent cited *Conlee* in its brief, asserting that petitioner's claims were moot. In reply, petitioner alleged that his claims were not moot and cited a federal court of appeals case considering habeas-corpus challenges to an attorney's criminal-contempt conviction despite the attorney's service of his sentence. *See* Respondent's Appendix at A32-34. He did not, however, cite *Conlee* or claim that its holding or a holding of mootness would violate his constitutional rights, much less his rights under either the Due Process or Equal Protection Clauses of the Fourteenth Amendment. *See* Respondent's Appendix at A32-34. When the Arkansas Supreme Court issued its opinion, it held that "the question of whether the circuit court erred in holding [petitioner] contempt is moot." Petitioner's Appendix at App. 9. Having never been presented with an equal-protection or due-process challenge to its mootness case law, it did not decide whether such a holding was, itself, unconstitutional under those provisions.

Petitioner requested rehearing. In his petition, he quoted a portion of section 1 of the Fourteenth Amendment and, in a later section, cited two of this Court's cases, *Carafas v. LaVallee*, 391 U.S. 234, 237-38 (1968), and *Fiswick v. United States*, 329 U.S. 211, 220-22 (1946), and three appellate cases for the proposition that the collateral consequences of the contempt conviction did not render his challenges to it moot. Respondent's Appendix at A40, A42-43. At no point did petitioner specifically allege that the

mootness holding itself violated his rights to equal protection or due process. Rather, in the final paragraph of his petition he asserted the following:

> Arkansas recognizes that when there are fundamental rights in issue, said rights may not be restricted. *Partin v. Bar of Arkansas*, 320 Ark. 37, 47, 894 S.W.2d 906, 911 (1995) (concerning access to courts). Where a fundamental right, such as access to the courts, is in issue, the standard for review is strict scrutiny. *Ayers v. Norris*, 43 F.Supp.2d 1039 (E.D. Ark. 1999) (holding statute unconstitutional which limited prisoner access).

Respondent's Appendix at A43-44. *Partin*, 320 Ark. at 47, 894 S.W.2d at 911, where cited, observes that this Court "has held that when a fundamental right is involved, a fee cannot restrict an indigent person's access to the courts[]" in accordance with due process. *Ayers*, 43 F.Supp.2d at 1042, 1051, whose holding was later abrogated in *Higgins v. Carpenter*, 258 F.3d 797, 798 (8th Cir. 2001) (per curiam), holds that 28 U.S.C. § 1915(g), the "three strikes" provision of the Prison Litigation Reform Act, is unconstitutional under the equal-protection component of the Fifth Amendment's Due Process Clause because it unduly restricts indigent prisoners' access to the courts.[1] The

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[1] The Arkansas Supreme Court allowed two *amici* to file pleadings in support of petitioner's petition for rehearing. One of those, the Arkansas Association of Criminal Defense Lawyers, explicitly asserted that the court's mootness ruling violated due process and equal protection. For present purposes,

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Arkansas Supreme Court summarily denied the petition in a one-line order. Petitioner's Appendix at App. 12.

The Arkansas Supreme Court did not address petitioner's claim before this Court that holding that his challenges to a contempt conviction were moot violated his rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Although it could be argued that petitioner raised his constitutional claims against a mootness holding in his petition for rehearing – a proposition respondent disputes, as it was not made with "fair precision" – by then it was too late under both the Arkansas Supreme Court's practice, *see, e.g.*, *Pannell v. State*, 320 Ark. 390, 391, 897 S.W.2d 552, 552 (1995) (per curiam), and this Court's. *See, e.g.*, *Adams*, 520 U.S. at 89 n.3. Moreover, the Arkansas Supreme Court's mootness holding was not unanticipated, such that petitioner could not have raised any challenges to it before rehearing. *See, e.g.*, *Herndon v. Georgia*, 295 U.S. 441, 443-44, 446 (1935). As respondent has noted, that court decided that challenges to criminal-contempt convictions were moot before petitioner was ever held in contempt and respondent relied on the case in its appellate briefing. Petitioner had adequate opportunity to anticipate the court's ruling before rehearing. In sum, petitioner's due-process and

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it is sufficient to note that *amicus*'s argument came too late to preserve the question presented here for the reasons explained in the text.

equal-protection claims were neither properly presented to nor addressed by the Arkansas Supreme Court, requiring the denial of his petition to this Court.

II. The Petition Does Not Demonstrate Any Conflict Of Authority Regarding The Due Process And Equal Protection Claims Petitioner Asks The Court To Decide And The Decision Below Does Not Violate Those Provisions In Any Event.

Petitioner purports to ask the Court to decide whether the Equal Protection and Due Process Clauses prevent a state court on direct appeal from holding that challenges to a criminal-contempt conviction are moot.[2] He expends the bulk of his petition asserting, however, that the challenges to his contempt conviction are not moot due to the fact that the conviction has collateral consequences and which are capable of repetition yet evading review and citing numerous cases from this Court and federal courts of appeals, primarily on the former issue. Petition at 12-24. The overwhelming majority of the cases cited by

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[2] Petitioner relies on the Fifth Amendment as a source of his equal-protection right, Petition at 25, but that reliance is mistaken. The Fourteenth Amendment applies to the states by its own force. He appears to be confused by the fact that the guarantee of the equal protection of the laws applies to the federal government through the Fifth Amendment's Due Process Clause. *See, e.g., Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 213-18 (1995).

petitioner are cases from this Court and the federal courts of appeals construing either the case-or-controversy requirement of Article III, § 2 of the United States Constitution or the federal habeas-corpus statute, *see, e.g.*, *Sibron v. New York*, 392 U.S. 40, 57-58 (1968) (holding that "constitutional rule against entertaining moot controversies" did not render moot challenge to conviction for which sentence already served); *Chacon v. Wood*, 36 F.3d 1459, 1463 (9th Cir. 1994) (holding federal habeas-corpus challenge not moot despite release from custody due to collateral consequences), and they are simply beside the point for at least two reasons.

First, the case-or-controversy requirement of Article III, § 2, which generally prohibits the consideration of moot claims which do not present the requisite live case or controversy, applies only to the jurisdiction of the federal courts, not state courts. *See, e.g.*, *Friends of Earth, Inc. v. Laidlaw Environmental Servs., Inc.*, 528 U.S. 167, 180 (2000) (explaining that constitution's "case-or-controversy limitation on federal judicial authority . . . underpins . . . mootness jurisprudence[ ]"). Similarly, state courts simply do not construe the custody requirement of the federal habeas-corpus statutes, 28 U.S.C. § 2241 *et seq.*, which provide a mechanism for relief exclusively in federal courts. *E.g.*, 28 U.S.C. § 2241(a) (providing that "[w]rits of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions[ ]"). Second, and perhaps more importantly, that

this Court or lower federal courts may have concluded that petitioner's claim was not moot, had the proceedings occurred in federal court, does not remotely address, or present a conflict of authority on, the issue of whether a mootness holding, when it is made, violates the Equal Protection or Due Process Clauses.

Indeed, the mootness holding challenged here does not violate those constitutional proscriptions. The Constitution does not require states to provide appellate review of convictions, *e.g.*, *Ross v. Moffitt*, 417 U.S. 600, 606 (1974), but once they do so, the procedures governing that review must comport with the Equal Protection and Due Process Clauses of the Fourteenth Amendment. *E.g.*, *Evitts v. Lucey*, 469 U.S. 387, 393 (1985). The Court has not provided a "precise rationale" for how the clauses operate in this context. *M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996) (citation and quotations omitted). In its most broad formulation, however, the Court has explained that equal protection requires that the "avenues [of appeal] must be kept free of unreasonable distinctions that can only impede open and equal access to the courts." *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966). It has been most often applied in cases involving indigent defendants who, the Court has said, must have "an adequate opportunity to present [their] claims fairly in the context of the State's appellate process." *Pennsylvania v. Finley*, 481 U.S. 551, 556 (1987) (citations and quotations omitted); *see also*, *e.g.*, *M.L.B.*, 519 U.S. at 120 (explaining that the "equal protection concern relates to the legitimacy of fencing

out would-be appellants based solely on their inability to pay core costs[]"). This guarantee extends to those convicted of petty offenses for which incarceration is not imposed. *Mayer v. Chicago*, 404 U.S. 189, 196-98 (1971). Due process, in turn, requires states "to offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal." *Evitts*, 469 U.S. at 405; *see also, e.g.*, *M.L.B.*, 519 U.S. at 120 (explaining that due process ensures "the essential fairness of the state-ordered proceedings anterior to adverse state action[]"); *see generally Halbert v. Michigan*, 545 U.S. 605, 610-12 (2005) (explaining equal-protection and due-process requirements governing criminal appellate procedures); *Smith v. Robbins*, 528 U.S. 259, 276-77 (2000) (same).

Nothing in the Arkansas Supreme Court's mootness holding runs afoul of these principles. As an initial matter, contrary to what petitioner argues, the Arkansas Supreme Court here did not deprive him of his right to a direct appeal. *See, e.g.*, Arkansas Rule of Appellate Procedure – Criminal 1(a) (2007) (providing right of appeal to person convicted of a misdemeanor; version in effect when petitioner held in contempt); Ark. Code Ann. § 16-10-108(b)(1) (Supp. 2007) (providing that contempt is a Class C misdemeanor).[3]

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[3] The Arkansas Supreme Court has held that, because courts have the inherent power to punish for contempt, they are not limited by the penalties for contempt established by the legislature. *E.g.*, *Arkansas Dep't of Human Servs. v. Clark*, 305 Ark. 561, 565-66, 810 S.W.2d 331, 333-34 (1991). Because petitioner was sentenced to one day's confinement, a punishment

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While the court declined to entertain petitioner's challenges to the contempt finding, it nevertheless "address[ed] the propriety" of the trial court's underlying order requiring defendants to request a trial 48 hours before their scheduled trial date, concluding that such an order is inappropriate. Petitioner's Appendix at App. 9-11. It did so despite the general rule that review of underlying orders is not available on appeal from contempt findings. *See, e.g., Carle v. Burnett*, 311 Ark. 477, 480-81, 845 S.W.2d 7, 9-10 (1993). Petitioner hardly was deprived of an appeal when the Arkansas Supreme Court sustained one of his main challenges to his contempt finding. *See* Respondent's Appendix at A1, A12-17.

Even if the court had declined to consider any of petitioner's claims, however, that would not have violated the Equal Protection and Due Process Clauses, as the Arkansas Supreme Court's mootness holding does not evidence a blanket refusal to consider appeals from petty offenses, including contempt. To the contrary, the Arkansas Supreme Court regularly entertains and, in fact, sustains challenges to convictions for petty offenses, including contempt. For example, that court has reversed contempt convictions in circumstances in which an attorney contemnor was fined $500, *Rosenzweig v. Lofton*, 295 Ark. 573, 574, 751 S.W.2d 729, 729 (1988), and ordered to

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authorized for a Class C misdemeanor, *see* Ark. Code Ann. § 5-4-401(b)(3) (Repl. 2006), however, respondent views his conviction as such for present purposes.

provide free legal services, *McCullough v. Lessenberry*, 300 Ark. 426, 427, 430, 780 S.W.2d 9, 9, 11 (1989). *See also, e.g., Witherspoon v. State*, 322 Ark. 376, 377-78, 909 S.W.2d 314, 315 (1995) (considering challenges to contempt conviction for which Witherspoon sentenced to ten days' confinement). Particularly apt here is *Etoch v. State*, 343 Ark. 361, 365-66, 37 S.W.3d 186, 189-90 (2001), in which the court reversed the contempt convictions for which an attorney had been sentenced to two concurrent sentences of one day's confinement due to the trial court's failure to afford him a jury trial when it had not foreclosed the possibility of a term of imprisonment of more than six months before trial. The court likewise has not been hesitant to entertain challenges to petty non-contempt convictions. *See, e.g., Grinning v. City of Pine Bluff*, 322 Ark. 45, 47, 907 S.W.2d 690, 690-91 (1995) (reversing disorderly conduct and refusal-to-submit-to-arrest convictions for which Grinning fined $600 for failure to afford 12-person jury); *Liggett v. State*, 309 Ark. 608, 609-12, 832 S.W.2d 813, 813-15 (1992) (entertaining challenge to driving-on-suspended-license conviction for which Liggett sentenced to ten days in jail); *Johnston v. City of Pine Bluff*, 258 Ark. 346, 347-48, 525 S.W.2d 76, 76 (1975) (reversing conviction for violating speeding ordinance for which Johnston fined $10 due to lack of jury trial).

As its consideration of appeals from convictions for petty offenses indicates, the possibility of a mootness holding does not completely foreclose appellate review of such convictions by the Arkansas Supreme

Court (or the Arkansas Court of Appeals), even when a short period of confinement is ordered. Arkansas law authorizes bail on appeal for the misdemeanor offense at issue here, *see, e.g.*, Arkansas Rule of Appellate Procedure – Criminal 6(b)(1) (2007) (version in effect when petitioner held in contempt); *Olmstead v. Olmstead*, 373 Ark. 354, 355-56, ___ S.W.3d ___, ___ (2008) (per curiam) (confirming availability of bail under Rule 6(b)(1) to persons convicted of contempt), but nothing in the record indicates that petitioner sought bail or any kind of stay. Had the trial court denied bail or a stay, petitioner could have pursued a stay and a writ of certiorari to the Arkansas Supreme Court. Indeed, that court previously has granted stays and writs of certiorari to contemnors sentenced to short terms of confinement whose "jail-time would run but for th[e] court's stay and expedited appeal." *Ivy v. Keith*, 351 Ark. 269, 276-77, 92 S.W.3d 671, 676 (2002) (noting court's granting of stay and considering case as a petition for writ of certiorari because normal appellate review "useless[ ]" due to short term of confinement); *see also, e.g., Johnson v. Johnson*, 343 Ark. 186, 196, 33 S.W.3d 492, 498 (2000). The one day's confinement imposed on petitioner admittedly was short, but the Arkansas Supreme Court not infrequently grants temporary stays of orders the day they are requested. *See, e.g., Pulaski County v. Arkansas Democrat-Gazette, Inc.*, 370 Ark. 433, 434, 260 S.W.3d 298, 298 (2007) (per curiam). Thus, petitioner might have preempted a holding of mootness, but failed to even pursue remedies to do so.

The general availability of appellate review for petty offenses and of bail, temporary stays, and certiorari review makes it clear that the Arkansas Supreme Court's holding of mootness did not violate petitioner's right to equal protection and due process. Arkansas law clearly afforded him a fair opportunity to litigate his challenges to his contempt conviction, but his own failure to take measures to keep his claim from becoming moot cut off that opportunity. The opportunity for review of his claims, however, is what petitioner was entitled to in accordance with this Court's due-process and equal-protection jurisprudence. *See, e.g.*, *Finley*, 481 U.S. at 556; *Evitts*, 469 U.S. at 405.[4] The mootness holding challenged here is rightly viewed as akin to a procedural bar – petitioner simply failed to take any steps to preserve his claim for appellate review. This Court previously has indicated that, as a general matter, state procedural rules are neither arbitrary nor fundamentally

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[4] That opportunity is what distinguishes this case from *Sibron*, upon which petitioner relies. There, this Court refused to hold that Sibron's challenge to his conviction was moot despite the service of his sentence due, in part, to New York's "blanket denial of bail pending appeal." *Id.*, 392 U.S. at 53. The Court observed that "a State may not effectively deny a convict access to its appellate courts until he has been released and then argue that his case has been mooted by his failure to do what it alone prevented him from doing." *Id.*, 392 U.S. at 53 (footnote omitted). Here, in contrast, procedures were available to petitioner to attempt to obtain his release. *See, e.g.*, *id.*, 392 U.S. at 53 n.13 (distinguishing *St. Pierre v. United States*, 319 U.S. 41 (1943) (per curiam), on ground that St. Pierre could have taken steps to preserve his case, but failed to do so).

unfair, *cf.*, *e.g.*, *Evitts*, 469 U.S. at 398-99 (reaffirming "States' ability to conduct appeals in accordance with reasonable procedural rules[]"), and should decline to entertain what amounts to a challenge to such a rule here.

CONCLUSION

The petition for a writ of certiorari to the Arkansas Supreme Court should be denied.

Respectfully submitted,

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APPENDIX

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Statement of the Case and Argument Sections of Petitioner's Initial Brief in the Arkansas Supreme Court A1

Petitioner's Reply Brief in the Arkansas Supreme Court A31

Petitioner's Petition for Rehearing in the Arkansas Supreme Court A35

STATEMENT OF THE CASE AND ARGUMENT SECTIONS OF PETITIONER'S INITIAL BRIEF IN THE ARKANSAS SUPREME COURT

THE STATEMENT OF THE CASE

The Petitioner, Ken Swindle, is an attorney who has appealed to this Court, seeking judicial review of the trial court order of September 10, 2007, R. 65, Ab. 2, which found the Petitioner in contempt orally for requesting a jury trial in asserted violation of the trial court's scheduling order. *Id.* Petitioner filed notices of appeal from the original order and a later denial of a motion for reconsideration. R. 31, Add. 22, R. 84, Add. 38, R. 91 Add. 42

The case presents an issue of whether the provisions of the Arkansas Constitution, Article II, Section 10, allow one to have a jury trial in a criminal case without allegedly complying with advance notification according to a trial court order, and whether counsel may be held in contempt for requesting a jury trial on the day of the trial. Supreme Court Rule 1-2(a)(5) provides that this Court should hear cases involving discipline of attorneys.

The trial court rules that counsel's assertion of a right to a trial by jury on the trial date, in violation of a pretrial order that notice must be given within 48 hours of trial, was not "the way we do things here," and jailed the attorney for 24-hours. R. 66-67, Ab. 3-4 Thereafter, the written order added other grounds for the contempt, for allegedly failing to return the

prosecutor's telephone calls and making "uncivil" remarks about the prosecutor in open court. R. 20-21, Add. 47-48 The record says Petitioner argued that the prosecution had not responded to discovery, that the prosecutor was "unprepared", and that he had requested a jury trial in pleadings, which the Court disputed. R. 66, Ab. 3

As to the earlier Arraignment of July 11, 2007, the trial court had informed the Appellant that he had a right to a trial by jury. R. 60, Ab. 1; R. 6, Add. 5 On July 12, 2007, the day after the Arraignment, the trial court transmitted, by facsimile, its letter order, which required notification 48-hours or more of a request for a jury trial. R. 12, Add. 8 Appellant's Motion to Continue and Objection to Notice, R. 10; Add. 6, filed the next day on July 13, 2007, asserted that the Court's scheduling order was objected to. R. 10, Add. 6 Appellants argued that the notice was unclear and ambiguous. R. 10, Add. 6 They further stated that the Appellant did not waive any Constitutional rights under the state or federal constitutions. R. 10, Add. 6 That Motion was filed 59 days before the contempt ruling, and by it the Petitioner-counsel requested a jury trial. An amended notice was filed on July 16, 2007 (56 days before the contempt ruling) and stated that the Petitioner "continued to object to the setting notice", and requested "all other rights guaranteed to him by the Arkansas and Federal Constitutions." R. 17, Add. 12 The trial court, however, stated in the hearing of September 10, 2007, that it had not received Petitioner's pleadings making

a request for a jury trial. R. 67, Ab. 4 Three days after the citation of contempt, the trial court reset the matter for trial for November 21, 2007, by another letter requiring notification 48-hours or more of a request for a jury trial Petitioner. R.37, Add. 28 The Appellant-Petitioner filed a third objection to the notice on November 9, 2007. R. 93; Add. 44

Petitioner filed a Motion and Brief for Reconsideration of the trial court order of contempt. R. 22, Add. 14 In it, the Petitioner noted his request for a jury trial was guaranteed by the Constitutions and pointed out the motions filed on July 13 and July 16, 2007, requested rights so guaranteed. Petitioner also noted that the trial court should have given Petitioner notice of a hearing concerning the telephone calls since that matter did not occur in the presence of the trial court. As to the allegedly uncivil remarks, Petitioner wrote that his statements were factually true, namely that there was a failure by the Prosecutor to respond to discovery and that the prosecutor was unprepared for trial. Petitioner obtained a copy of the transcribed September 10, 2007, hearing and filed an Amended Motion for Reconsideration, including that transcription. R. 57, Add. 36 The Petitioner then subpoenaed for purposes of hearing on the motion for reconsideration and for appeal the actual tapes, and back-up tapes, R. 153, Add. 53, but the trial court quashed the subpoenas prior to the hearing, R. 82, Add. 49, notwithstanding that Petitioner had designated them for this Court's record on appeal. R. 32, Add. 23, R. 40, Add. 86

The trial court held a hearing on the reconsideration request, and the prosecutor testified that what Appellant-Petitioner said was technically correct that she was unprepared to try the case on September 10, 2007. R. 122-23, Ab. 5 The circuit court judge stated in the reconsideration hearing that the Appellant-Petitioner never raised his voice. R. 145, Ab.5

The trial court entered an order denying the Motion and Brief for Reconsideration. R. 88, Add. 50 Petitioner amended his notices of appeal, appropriately. R. 91, Add. 42 In the notices of appeal, the Petitioner designated the original and back-up tapes of the court reporter for the September 10, 2007. R. 92, Add. 43

VII.

ARGUMENT

A. A SUMMARY OF APPELLANT'S ARGUMENT

This case brings before the Court the issue of whether the trial court's finding of contempt against an attorney was supported by the evidence and legal precedent. The trial court initially informed Appellant, Juan Lux-Lux, represented by Attorney-Petitioner, Ken Swindle, of his right to a jury trial on the day of Arraignment, on July 11, 2007. R. 60, Ab. 1; R. 6, Add. 5 Appellant-Petitioner, with his client, Appellant, appeared for trial, on September 10, 2007, and asserted request for a jury trial. R. 65, Ab. 2 Petitioner had previously filed two pleadings challenging the trial court's requirement of 48-hours notice if one

intended to have a jury trial. R. 10, Add. 6, R. 17, Add. 12 The earlier pleadings had questioned the clarity and ambiguity of the pre-trial orders, and each asserted entitlement to all rights guaranteed by the state and federal constitutions. *Id.*

The trial judge asserted, on the day of its finding of contempt, that he had not received anything in writing in the form of pleadings requesting a jury trial, although Petitioner told the judge that he had filed pleadings. R. 67, Ab. 4 The written order said that Petitioner's statement that he had filed pleadings requesting a jury trial was incorrect. Order, R. 21, Add. 48 The trial court's order included other assertions that are not shown in the reporter's record, namely that Petitioner made uncivil remarks about the prosecutor. R. 20-21, Add. 47-48 In fact, Petitioner said the prosecutor had not complied with written discovery and was unprepared for trial, which the prosecutor later testified to be a factually true statement at the Motion for Reconsideration. R. 122

After filing a Motion for Reconsideration, R. 22, Add. 14, and ultimately including a copy of the transcript below, R. 576, Add. 36, the trial court denied the motion for reconsideration, R. 88, Add. 50, so the Petitioner amended his notice of appeal to include the denial of the reconsideration request. R. 91, Add. 42

Appellant-Petitioner is entitled for this Court to reverse the finding of contempt, since where the record clearly indicates a lack of support of contempt, this Court should reverse and remove any taint of

impropriety on the part of the attorney. *Rosenzweig v. Lofton*, 295 Ark. 573, 585, 751 S.W.2d 729, 734 (1988).

STANDARD OF REVIEW OF CRIMINAL CONTEMPT

The standard of review of a finding of criminal contempt in the following sections is whether the finding was supported by substantial evidence, and whether the proof was shown that counsel engaged in criminal contempt, beyond a reasonable doubt. *Witherspoon v. State*, 322 Ark. 376, 909 S.W.2d 314 (1995).

INTRODUCTION

Courts have inherent authority to punish for contempt if an act interferes with the order of the court's business or proceedings or reflects upon the court's integrity. See, e.g., *Taylor v. State*, 76 Ark. App. 279, 64 S.W.3d 278 (2001). This authority would include actions in court, or direct contempt. The Court's power of contempt for actions outside the courtroom, or indirect contempt powers, are found in Article II, Section 26 of the Arkansas Constitution and Arkansas Code Annotated, Section 16-10-108. The Court's Order references both actions in the Courtroom and outside the Courtroom. Therefore, it is unclear whether the Court's finding was one of indirect contempt or direct contempt; however, it appears to be both.

For criminal contempt, there must be proof beyond a reasonable doubt, as to direct actions in the presence of the trial court. For all matters referenced in the Court's Order to actions outside the scope of vision of the Court, the Petitioner is entitled to notice of the charges, an opportunity to prepare a defense, and trial by jury, pursuant to his rights of due process and statutory law. Ark. Code Ann., § 16-10-108(c). See also, *Witherspoon v. State*, 322 Ark. 376, 909 S.W.2d 314 (1995), and *Ivy v. Keith*, 351 Ark. 269, 92 S.W.3d 671 (2002).

It must be made clear whether the contempt charge was civil contempt or criminal contempt. Civil contempt protects the rights of private parties by compelling compliance with orders of the court made for the benefit of private parties. However, criminal contempt preserves the power of the court, vindicates its dignity and punishes those who disobey its orders. See, e.g., *Johnson v. Johnson*, 343 Ark. 186, 197, 33 S.W.3d 492, 499 (2000).

> "Because civil contempt is designed to coerce compliance with the court's order, the civil contemnor may free himself or herself by complying with the order. This is the source of the familiar saying that civil contemnors 'carry the keys of their prison in their own pockets.' Criminal contempt by contrast, carries an unconditional penalty, and the contempt cannot be purged."

Ivy v. Keith, 351 Ark. 269, 92 S.W.3d 671 (2002) (citations omitted).

Here, the Petitioner was given no opportunity to free himself. Therefore, although not specifically stated, the contempt was criminal. As such, the trial court's burden was to show beyond a reasonable doubt that Petitioner was guilty of conduct justifying citation for contempt. *Witherspoon v. State*, 322 Ark. 376, 909 S.W.2d 314 (1995).

B. THE TRIAL COURT'S FINDING OF CRIMINAL CONTEMPT WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND WAS CLEARLY ERRONEOUS AS A MATTER OF LAW.

Criminal contempt is available to a trial court to punish wrongful conduct committed in its presence. In the present case, the only two allegations of contemptuous conduct committed in the presence of the court were asking for a trial by jury, and allegedly making disrespectful comments about the prosecutor, when the Petitioner stated that the prosecutor did not comply with discovery and was unprepared for trial.

As to the first allegation, that of asking for a jury trial, the Order states:

> "That on the 10th day of September, 2007, defendant appeared with his attorney, Ken Swindle, who advised the Court that the case was filed in the 'wrong court' and further, that defendant requested a jury trial. That defendant's attorney, Ken Swindle, did not formally raise any jurisdictional issues or communicate with the Court as to the status

> of defendant's case prior to September 10, 2007."

Order, Paragraphs 4-5, R. 20, Add. 47

The above statement is factually incorrect. In the Arraignment, R. 62, Ab. 2 the Petitioner pointed out to the Court that the Defendant's birth date as stated on felony charge was incorrect and that the Defendant was a minor, to which the trial court responded that the State will address that. R. 62 Further, again at the Arraignment, R. 60, Ab. 1, Appellant was apprised of his right to a trial by jury and never waived it. Subsequent pleadings asserted all rights guaranteed by the Arkansas and United States Constitutions and objected to the trial court's requested 48 hour notice of those requesting a jury trial. R. 10, Add. 6; R. 17, Add. 12, R. 67, Ab. 3, filed on July 13, 2007 and July 16, 2007, respectively.

Therefore, it is simply factually incorrect that the Appellant, through his attorney, Petitioner Ken Swindle "did not formally raise any jurisdictional issues or communicate with the Court as the status of defendant's case prior to September 10, 2007." R. 20, Add. 47

Requesting a trial by jury for a client is, for the reasons that are apparent, not criminal contempt and manifestly is not improper. Firstly, the trial court previously informed the Appellant, Juan Lux-Lux, that he was entitled to a jury trial. Secondly, the arraignment document also gave notice of a right to a trial by jury. The Arkansas Rules of Criminal

Procedure provide that – absent waiver – one is entitled to a trial by jury. The Arkansas Constitution provides for a right to trial by jury. The same trial court has previously been informed by the Court of Appeals that any pre-trial orders which require notice in order to assert this constitutional right are improper. See, *Reaser v. State*, 47 Ark.App. 7, 883 S.W.2d 851 (1994) (addressing the same notice from the same court).

In the present case, Appellant, Juan Lux-Lux, never waived his right to a jury trial, and his counsel, Petitioner, attorney Ken Swindle, asserted his right. Rather than the trial court assuming that there has been a waiver of a jury trial if a defendant gives no notice of a request for a jury trial, the trial court should assume that one is asserting a jury trial absent notice to the contrary. The Arkansas Rules of Criminal Procedure provide: "No defendant in any criminal cause may waive a trial by jury unless the waiver is assented to by the prosecuting attorney and approved by the court." Rule 31.1.

There was no waiver in this case to a trial by jury. The trial court could point to no evidence in the record of waiver by the prosecutor. Rule 31.2 it requires a defendant seeking to waive a trial by jury to do so either "(1) personally in writing or in open court, or (2) through counsel if the waiver is made in open court and in the presence of the defendant." *Id.* The record of such waiver must be preserved under the wording of Rule 31.2. "A verbatim record of any proceedings at which a defendant waives his right to

a trial by jury in person or through counsel shall be made and preserved." There is no evidence of waiver by the Defendant in this record.

As is clear from the record, there was no act of contempt in the trial proceedings before the court. In fact, the trial court later conceded that there was nothing improper in the Petitioner's tone of voice at the September 10, 2007, hearing. R. 145 The pertinent testimony was a colloquy between counsel and the trial court and is succinct as follows:

> "Ms. Stanimirovic: Your Honor, if I may. Defendant – I received a message at 4:05 on Friday afternoon that he was requesting a jury trial.
>
> Mr. Swindle: That is incorrect, Your Honor. Defendant's request for jury trial was made previously but the Prosecutor's Office is not ready to proceed. There's also been a Motion for discovery filed in this case which has not yet been responded to. Also, at the Arraignment in this matter I notified the Prosecutor's Office this is the incorrect Court for this case because the Defendant is too young to be in this Court. The Prosecutor is obviously not prepared. She has misinformed the Court."

R. 66, Ab. 3

This is not an act of criminal contempt, as the only conduct possibly occurring in the presence of the trial court is reflected above, and it was not an act of defiance but one of constitutional muster.

1. THE TRIAL COURT'S ORDER WAS INVALID, AND PETITIONER'S CHALLENGE TO IT WAS PROPER.

The trial court in this case sent a letter to all counsel participating before it and informed them that they must give notice 48-hours or more in advance of any trial setting if their clients wishes to have a trial by jury. R. 12, Add. 8 Petitioner challenged the letter a pleading, "Motion to Continue and Objection to Notice," in which he asserted that the notice was invalid, and his client requested all rights under the state and federal constitutions. R. 10, Add. 6; R. 17, Add. 12 Petitioner's objections to the notice requirement of the trial court were filed on July 13, 2007 and July 16, 2007, respectively.

The trial court's hearing on September 10, 2007, treated these objections as a surprise, in that the judge denied receiving any pleadings asserting a right to trial by jury and denied anticipating that the Petitioner was requesting Appellant's right to be tried by his peers, as the transcript reflects. R. 67, Ab. 3

The trial court's letter stated:

> "Dear counselors: Please be advised that the following cases have been set for trial, reset for trial, or set for hearing on the dates indicated below . . . Please mark your calendars accordingly. *If a jury is requested, please notify my office at least 48 hours in advance, or it will be assumed that a bench trial is sufficient or a plea will be entered on the trial date.*"

R. 12, Add. 8, R. 37, Add. 28 (emphasis in trial court's original).

Petitioner's objections, filed 59 days and 56 days in advance of the hearing stated,

> "2. This notice was sent despite repeated repudiations of such notices to this particular Court by the Arkansas Appellate Courts. *Duty v. State*, 45 Ark. App. 1, 871 S.W.2d 400 (1994); *Reaser v. State*, 47 Ark. App. 7, 883 S.W.2d 851 (1994); *Ayala v. State*, 365 Ark. 192 (2006).
>
> "3. The above-reference notice is ambiguous and unclear to the Defendant. There has been no omnibus hearing in this matter, nor has the Defendant waived any of his Constitutional rights. For both of these reasons, the Defendant objects to the above-referenced notice.
>
> ". . . .
>
> "Wherefore, Defendant respectfully requests that the hearing set for September 10, 2007 be continued and that he be given a date for an omnibus hearing and for all other rights guaranteed to him by the Arkansas and Federal Constitutions."

R. 10-11, Add. 6-7

See also Amended Motion to Continue and Objection to Notice, R. 17, Add. 12 Both objections were filed before the September 10, 2007, trial date and

directly challenged the trial court's order since it was contrary to this Court's rulings.

In *Grinning v. City of Pine Bluff*, 322 Ark. 45, 49, 907 S.W.2d 690, 692 (1995), the Supreme Court wrote:

> "In every criminal trial where there is a right to trial by jury, the court should proceed as if there will be a jury trial, and it is the court's burden to ensure that, if there is to be a waiver, the defendant waives her right to trial by jury in accordance with the Arkansas Constitution and Rules of Criminal Procedure."

Id.

The Opinion noted that the Arkansas Constitution, Article II, Section 7, guarantees a defendant's right to a jury trial and can only be waived "in the manner prescribed by law." 322 Ark. at 48, 907 S.W.2d at 691.

This Court has consistently ruled that notices such as the ones in this case are invalid. In *Winkle v. State*, 310 Ark. 713, 841 S.W.2d 589 (1992), the Supreme Court reversed a defendant's convictions and held that he was entitled to a jury trial. It was undisputed that a notice was sent which set the case for a non-jury trial, and there was no objection. The Court ruled that one may not forfeit a right to a jury trial, despite such a notice, absent waiver.

The present trial court judge's order was directly in focus in *Reaser v. State*, 47 Ark. App. 883 S.W.2d 851 (1994), where it also said that one must notify the court 48 hours in advance of a request for a trial by jury. The Court of Appeals ruled that this notice was invalid, holding that Article II, Sections 7, 10, of the Arkansas Constitution provide for a trial by jury, and Rule 31.3 of the Arkansas Rules of Criminal Procedure sets out a procedure for waiver. A criminal defendant bears no burden of requesting a trial by jury, the Court wrote. The same order, the same judge (the Honorable William Storey) and the same below-signed counsel for the Appellant (Doug Norwood) were involved in that case, in a decision handed down by the Court of Appeals in 1994. The trial court's order in the present case is as improper as the earlier one, and this Court should rule that Petitioner was correct in challenging it and should not have been held in contempt for doing so. By so ruling 14 years ago, the Arkansas Court of Appeals was not attempting to hamstring a trial court, but it was following the precepts of the Supreme Court, as noted in *Winkle v. State*, in 1992.

The Court of Appeals wrote:

> "We are also sensitive to the trial judge's situation in trying to manage, in an orderly fashion, his or her docket, but again, the Supreme Court has strictly enforced the rule regarding waiver, and we are constrained to do the same."

47 Ark. App. at 7, 883 S.W.2d at 854.

Petitioner noted in the short hearing that: "Defendant's request for jury trial was made previously", and he also noted he had requested a jury trial in his pleadings. R. 66-67, Ab. 3-4

Petitioner's words in the hearing, and his written pleadings before it, R. 10-11, Add. 6-7, R. 17, Add. 12, constituted advocacy for his client and no less than a request for a jury trial, in a respectful and diligent fashion. As Justice Brown states:

> "Contempt or the threat of contempt should not be used to chill an attorney's vigorous but respectful advocacy on behalf of a criminal defendant. Again, I agree that Mr. McCullough crossed the line, but there was also no warning that contempt was imminent, as there was in the *Segal* case."

McCullough v. State, 353 Ark. 362, 108 S.W.3d 582 (Justice Brown concurring in Part and dissenting in part.)

The trial court's response was that Petitioner was not entitled to request a jury trial for his client, apparently since he failed to give 48-hours notice. In fact, the Petitioner had given notice, twice, that he objected to the 48-hour requirement and was not waiving any rights guaranteed by the Arkansas and United States Constitutions, which manifestly was a request for a jury trial. The trial court's denial of receiving pleadings is perplexing, R 67, Ab. 3 Perhaps the trial court did not recognize the pleadings as requesting a jury trial, but if that is the case, its

decision in that regard cannot be supported by this Court as the pleadings consistently objected to the 48 hour notice requirement and explicitly said that Appellant was not waiving his rights under the Arkansas and United States Constitutions, which the courts have held is necessary to waive a jury trial.

2. PETITIONER'S CONDUCT IN THE HEARING WAS INSUFFICIENT TO CONSTITUTE CRIMINAL CONTEMPT.

The Petitioner in this case made statements in the hearing of September 10, 2007, which (1) asserted the right to a jury trial; (2) noted the prosecution had not responded to discovery and was unprepared for trial; and that (3) the case should be heard in juvenile court since Appellant was a minor. R. 67-68, Ab. 2-3

Criminal contempt is intended to protect the integrity of the court. The standard of review in an appeal from a finding of criminal contempt is whether the trial court's decision was supported by substantial evidence and whether it was shown beyond a reasonable doubt that the party was guilty of contemptuous conduct. *Witherspoon v. State*, 322 Ark. 376, 378, 909 S.W.2d 314, 315 (1995), noted:

> "A criminal contempt citation must be based on evidence showing guilt beyond a reasonable doubt . . . In an appeal of a case of criminal contempt, we view the record in the light most favorable to the decision of the trial judge and sustain that decision if it is supported by substantial evidence . . .

> Substantial evidence is evidence of a sufficient force and character to compel a conclusion one way or another, forcing the mind to pass beyond suspicion or conjecture."

Id. (citations omitted).

Criminal contempt and civil contempt are governed by Arkansas Code Annotated, Section 16-10-108, which provides:

> "(a) Every court of record shall have power to punish, as for criminal contempt, persons guilty of the following acts and no others:
>
> "(1) Disorderly, contemptuous, or insolent behavior committed during the court's sitting, in its immediate view and presence, and directly tending to interrupt its proceedings or to impair the respect due to its authority;
>
> "(2) Any breach of the peace, noise, or disturbance directly tending to interrupt its proceedings;
>
> "(3) Wilful disobedience of any process or order lawfully issued or made by it;
>
> "(4) Resistance, willfully offered by any person to the lawful order or process of the court; and
>
> "(5) The contumacious and unlawful refusal of any person to be sworn as a witness

> and when so sworn a similar refusal to answer any legal and proper interrogatory."

Id.

In *Taylor v. State*, 76 Ark. App. 279, 282-83, 64 S.W.3d 278, 281 (2001), it was noted that in criminal contempt, the offending conduct must be committed "in the view and presence of the court" to be punished summarily. Manifestly, the statute requires the actions to be committed in the presence of the trial court to be summarily punished as well, by its plain wording.

In the present case, the actions committed in the presence of the trial court are limited to the hearing of September 10, 2007, in which counsel reasserted his client's request for a jury trial since there had been no waiver, commented that the prosecution had not yet complied with discovery and was unprepared for trial, and that counsel had requested a jury trial in pleadings. All of these things were true, and they were asserted in light of the Petitioner's duty of advocacy for his client, in view of this Court's previous pronouncements.

In this case. Petitioner did not engage in any disrespectful conduct but simply asserted his client's rights to a jury trial and to discovery by his statements in the short hearing of September 10, 2007. As noted by the Supreme Court in *Witherspoon v. State*, 322 Ark. 376, 381, 909 S.W.2d 314, 317 (1995),

> "An act is contemptuous if it interferes with the order of the court's business or proceedings, or reflect upon the court's integrity . . . The inherent power to punish for contempt should never be exercised except where the necessity is plain and unavoidable if the authority of the court is to continue . . . The court's contempt proceedings are to preserve the power and dignity of the court, to punish for disobedience of orders, and to preserve and enforce the rights of the parties."

Id. (citations omitted).

Under the Arkansas Constitution, Article VII, Section 26, the General Assembly is allowed to proscribe contempt, which it has done. Ark. Code Ann. § 16-20-108. It cannot be said that Petitioners' assertions in the hearing of this case amounted to criminal contempt to justify incarceration. The effects of upholding such a trial court action would have a chilling effect on advocacy.

Before criminal contempt may be imposed, there must be strict satisfaction of the constitutional and statutory requirements. A finding of criminal contempt must be shown "beyond a reasonable doubt." *Witherspoon v. State, supra*, 322 Ark. at 378, 909 S.W.2d at 315.

In *Allison v. Dufresne*, 340 Ark. 583, 12 S.W.3d 216 (2000), the Supreme Court noted that criminal penalties shall not be imposed without protections provided in our Constitution. In the present case, the Constitution delegated to the Legislature the ability

to provide for contempt, and there is simply no evidence that is sufficient in this case to find that Petitioner's conduct below was in contempt of the trial court.

STANDARD OF REVIEW OF CIVIL CONTEMPT

The standard of review of a finding of civil contempt in the following sections in whether the finding was supported clearly against the preponderance of the evidence, or erroneous as a matter of law. *Dennison v. Mobley*, 257 Ark. 216, 515 S.W.2d 215 (1974).

C. PETITIONER WAS NOT GUILTY OF CIVIL CONTEMPT.

In *Dennison v. Mobley*, 257 Ark. 216, 515 S.W.2d 215 (1974), the Supreme Court distinguished between civil and criminal contempt, noting that in the former the enforcement of private rights are in issue. In the present case, it is unclear how an alleged failure to return telephone calls, as asserted by the lower court, R. 21-21, Add. 47-48, even if proven true, would not grossly affect the rights of the prosecution in a manner such as to require the court's intervention – with jailing of the attorney allegedly dilatory in returning message calls.

It is certain that in a civil contempt action, the trial court may not act in an arbitrary manner or against the weight of the evidence. *Ward v. Ward*, 273 Ark. 198, 202, 617 S.W.2d 364, 366 (1981).

In order to punish one for civil contempt, the trial court must find that behavior has occurred *outside* of its presence which is contemptuous, and there must be due process notice given with time to prepare for a trial. This is a fundamental precept of due process under the Arkansas and United States Constitutions, in that one is entitled of an opportunity to be heard.

1. THE TRIAL COURT ERRED IN DENYING COUNSEL DUE PROCESS OF LAW.

In this case, there was no opportunity to be heard as the Petitioner attorney Ken Swindle was summarily jailed. The trial court's order ruled Petitioner in contempt for actions allegedly occurring outside of the presence of the trial court, namely allegedly failing to return prosecution telephone calls. The contempt order appealed from demonstrates that this was a basis of the court's finding of contempt as follows:

> "6. That Deputy Prosecuting Attorney Chreea Stanimirovic, on four occasions, attempted to discuss the status of defendant's case with his attorney, Ken Swindle, by telephone, which attempts were unsuccessful in that defendant's attorney, Ken Swindle, did not return Deputy Prosecutor Stanimirovic's telephone calls."

Order, R. 20, 21, Add. 47-48

In *Ivy v. Keith*, 351 Ark. 269, 92 S.W.3d 671 (2002), the Supreme Court wrote that if actions are committed outside the presence of the trial court,

then the alleged condemner is entitled to due process notice sufficient to present a defense.

> "Both the Arkansas Constitution and the governing state statute distinguish between direct and indirect contempt. *See* Ark. Const., Art. 7, §26; Ark. Code Ann. §16-10-108 (Repl. 1999). *See also Allison v. DuFresne*, 340 Ark. 583, 12 S.W.3d 216 (2000); *Davis v. Merritt*, 252 Ark. 659, 480 S.W.2d 924 (1972). Direct contempt is a contemptuous act 'committed within the immediate presence of the Court' . . . *Merrit*, 252 Ark. At 670, 480 S.W.2d at 930. Indirect contempt is contemptuous behavior committed outside the presence of the judge. An obvious example of direct contempt, besides open misconduct in the courtroom is a party coming to court drunk . . . Examples of indirect contempt include an attorney's failure to appear in court before receiving permission to withdraw as counsel . . . and failure to pay court costs.
>
> ". . . .
>
> "The *Johnson* [*Johnson v. Johnson*, 343 Ark. 186, 33 S.W.3d 492 (2000)] opinion uses the language associated with direct contempt. If the failure to comply with the judge's order had been considered indirect contempt, that is, outside of the trial judge's presence, then the prosecutors would have been entitled to due process protections of notification of the accusation and a reasonable time to make a defense. *See* Ark. Code Ann. §16-10-108(c) (Repl. 1999)."

351 Ark. at 280-81, 92 S.W.3d at 281.

The General Assembly has provided:

> "Contempts committed in the immediate view and presence of the court may be punished summarily. *In other cases, the party charged shall be notified of the accusation and shall have a reasonable time to make his or her defense.*"

Ark. Code Ann. §16-10-108(c) (emphasis supplied).

Since the allegations involving a failure to timely return telephone calls arose outside the "immediate presence" of the trial court, it is undeniable that the second section of this statute is applicable, and therefore Petitioner was entitled a "reasonable time to make his or her defense."

As noted by the United States Supreme Court:

> "If some essential elements of the offense are not personally observed by the judge, so that he must depend upon statements made by others for his knowledge about these essential elements, due process requires that the accused be given notice and a fair hearing."

In re Oliver, 333 U.S. 257, 275-76.

While the Petitioner would affirmatively state that he received exactly one telephone message from Deputy Prosecutor Stanimirovic, said call being on Friday, September 7, 2007, and returned it the same day, that evidence would have been extensively presented in a hearing, if one had been allowed prior

to the contempt finding by the Court, but the trial court refused to allow rudimentary due process. Where a trial court makes findings that are not based upon the substantial evidence on the record, the trial court should reverse its order upon which such findings rest.

The state and federal constitutions require due process. Our Legislature's pronouncement also requires rudimentary due process and an opportunity to prepare for a hearing in cases of civil contempt. Ark. Code Ann. §16-10-108(c); See also, *Ivy v. Keith*, 351 Ark. 269, 92 S.W.3d 671 (2002). Further, where the accused offender is a lawyer is representing a client on trial, punishment may be postponed until the conclusion of the proceedings, because "summary punishment always, and rightly, is regarded with disfavor." *Sacher v. United States*, 343 U.S. 1, 8 (1972). The Petitioner so requests such rights under the Arkansas and United States Constitutions.

The trial court's summary execution of its sentence of incarceration, without any attempt to allow Petitioner to retain counsel or have a due process hearing violated the fundamental due process rights even afforded to a criminal defendant. The court in effect disregarded the Petitioner's constitutional rights because it was angry. This is impermissible in civilized society of any citizen, much less one who is sworn to upheld the laws and constitutional rights of this State's citizens.

Those accused are entitled to a jury trial and all the attendant safeguards of our judicial system. In the present case, the trial court did not give the Petitioner his notice and due process required by law to entitled to him prepare and present his case before a jury of his peers. The Court's action in summarily sentencing the Petitioner without trial can be nothing but criminal contempt on its part, but if in fact it was civil contempt, it could only be based upon its later assertions of failing to return telephone calls of the prosecutor. For reasons stated, this alleged conduct, even if it occurred, would have required civil process, notice and a jury trial which Petitioner was denied. It would not in any event be contemptuous.

2. COUNSEL'S CONDUCT DID NOT CONSTITUTE CIVIL CONTEMPT.

Civil contempt occurs when counsel for litigants act in such a manner to justify court intervention. If this trial court is held that failure to return telephone calls is actionable, it is setting new precedent in this State, without providing any authority or precedent by this Court. The fact of the matter is that procedurally, it erred in holding counsel Petitioner Ken Swindle guilty of contempt for acts allegedly committed outside its presence without a due process hearing and opportunity to prepare as is statutorily required. Ark. Code Ann. §16-10-108(c). Further, it erred in holding that an alleged failure to return telephone calls is sufficient to hold one in civil contempt. As an initial matter, Petitioner denies the

allegation in the trial court's findings. R. 25-26i, Add. 17-18

This Court should reverse the Order appealed from, as the Appellant-Petitioner was not guilty of criminal or civil contempt, based on the factual findings in the trial court's order. Alternatively, procedurally, on the issue of civil contempt, the Appellant-Petitioner is entitled to a hearing on the merits. The trial court's allegations, however, would be insufficient to hold Petitioner in civil contempt.

STANDARD OF REVIEW

The standard of review in the following section is strict scrutiny of whether the trial court's procedure was necessary to avoid infringement upon a fundamental right, that of trial by jury, protected by the United States Constitution, Amendment VI, and due process as guaranteed by Amendment V, as applied to the State by the Fourteenth Amendment.

D. THE TRIAL COURT'S FINDING OF CONTEMPT, AND ITS PROCEDURE, INFRINGED UPON FEDERAL CONSTITUTIONAL GUARANTEES OF A RIGHT TO A JURY TRIAL AND CONSTITUTIONAL DUE PROCESS.

Where a State action infringes upon a fundamental right guaranteed by the United States Constitution, the standard of review is strict scrutiny. *Griswold v. Connecticut*, 381 U.S. 479 (1965). The United States Constitution guarantees one to a right

of trial by jury under the Sixth Amendment, and due process rights under the Fifth Amendment. These rights apply to the States by the Fourteenth Amendment. *Cabana v. Bullock*, 474 U.S. 376, 384-85 (1986).

Where an action limits fundamental rights, it must be justified by a *compelling* state interest. *Roe v. Wade*, 410 U.S. 113, 155, (1973); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969), and *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). The right to a jury trial in a criminal case is fundamental, and therefore the applicable standard of review in cases involving restriction of fundamental rights is undeniably that of strict scrutiny. In the present case, there were other means available for the trial court to control its docket or scheduling than infringing upon the accused's right to trial by jury.

Appellant, attorney Swindle, consistently raised the federal constitutional guarantees in his objection to the notice requirement which restricted his client's, Juan Lux-Lux's, right to trial by jury. R. 10, Add. 6, R. 17, Add. 12 The effect of the trial court's letter to all counsel appearing before it, if enforced, is to deny litigants who are criminal defendants their rights to trial by jury guaranteed under the federal Constitution. This right is clearly recognized in the federal rules as an *absolute* one, absent written waiver, and those rights are equally important in state court proceedings.

Fed. R. Cr. P. 23(e), states:

> "If the defendant is entitled to a jury trial, the trial must be by jury unless:
>
> (1) the defendant waives a jury trial in writing;
>
> (2) the government consents; and
>
> (3) the court approves."

Id.

This right is in accord with the Arkansas authorities cited above, and *a fortiori* under both federal and state Constitutions, it was improper for the trial court to hold Appellant's, Juan Lux-Lux's counsel, Appellant Ken Swindle, in contempt for asserting the constitutional guarantees of trial by jury due his client.

This trial court's attempt to punish a defendant's counsel for asserting this federal constitutional and procedural right cannot be countenanced, as it infringes upon a protected federal guarantee – that of trial by jury in a criminal case. A criminal defendant should not be coerced into waiving his right by jury by failure to give the notice mandated by this trial court.

The trial court's actions, which were constitutionally impermissible, as actions of the State of Arkansas must be rejected, and this Court should reverse the trial court's order from which this appeal arises and further direct the trial court by Mandate

to refrain from further infringements in the case of this Appellant and his counsel, as well as other criminal defendants which may be in the trial court. Under the United States Constitution, one has an unequivocal right to trial by jury and adequate representation of counsel under the Sixth Amendment. Appellant Swindle should not be punished for asserting the Constitutional guarantees due Appellant Lux-Lux.

VIII.

CONCLUSION

This Court should reverse the trial court's order of September 10, 2007, R. 20, Add. 47, and remand this case for a jury trial.

PETITIONER'S REPLY BRIEF IN THE ARKANSAS SUPREME COURT

* * *

ARGUMENT

The trial court has a requirement for a 48-hour notification in order to be qualified for a jury trial in a criminal case. This obligation is as invalid as a poll tax's payment in order to vote. This trial court holds attorneys in contempt and jails them, apparently, for demanding jury trials of criminal defendants if the notification is not given to the trial court. The court's letter stated:

> Dear counselors: Please be advised that the following cases have been set for trial, reset for trial, or set for hearing on the dates indicated below . . . Please mark your calendars accordingly. *If a jury is requested, please notify my office at least 48 hours in advance, or it will be assumed that a bench trial is sufficient or a plea will be entered on the trial date.*"

R. 12, Add. 8, R. 37, Add. 28 (emphasis in trial court's original).

Petitioner's objections, filed in advance of the hearing in this case noted such notices violate the Defendant's constitutional rights. R. 10-11, Add. 6-7; R. 17, Add. 12 Both objections were filed before the September 10, 2007, trial date in which the Defendant's attorney was put in jail and reprimanded publically. According to the Appellee State's own

exhibits attached to its Brief, Supp. Add. 4-7, this jailing was reported throughout the media in northwest Arkansas where counselor Ken Swindle practices law. The full ramifications, both on his livelihood, and in a potential disciplinary action, are to be seen, but the State cannot assume there are no continuing ramifications to what is in effect a criminal conviction for contempt. The State's brief characterizes this as one of "criminal" contempt. Appellee's Brief, at par. 1 and n.1, p. 1.

Appellee's sole response to the Appellant's brief is that this appeal is now moot. This errs. Our Court has noted in other cases where one is jailed, although released ultimately, that the matter is still ripe for adjudication on appeal. Further, where there is a continuing problem, here a standing trial court's order that flies in the face of the law of Arkansas and the United States Constitutions, as discussed in Appellant's principal brief, it is ripe for an appeal.

In *Bartley v. State*, 73 Ark. App. 452, 45 S.W.3d 387 (2001), the Supreme Court reversed a defendant's contempt conviction despite the fact that he had been incarcerated. He appeared in trial without an attorney and was summarily jailed. In reversing and remanding, the Opinion noted a violation of his rights under the constitutional protections. As noted in the Appellant's brief, this case too has serious constitutional ramifications which require a reversal, despite the fact that the Appellant attorney has been released from his jailing. *See also Taylor v. State*, 76 Ark. App. 279, 64 S.W.3d 278 (2001), and *Donovan v. State*, 95

Ark. App. 378, 237 S.W.3d 484 (2006), where contempt rulings were overturned on appeal.

If a wrong is likely to reoccur, this Court should hear an appeal. The circuit court's standing order flies in the faces of case law that absent a waiver, one is entitled to a jury trial. The trial court cannot unilaterally impose requirements upon assertion of that right when one's silence *per se* asserts the right to a trial by jury. The Supreme Court noted in *State v. Britt*, 368 Ark. 273, 276-77, 244 S.W.3d 655, 668 (2006), that:

> Both the State and Britt agree that this case should not be deemed moot because it involves an issue of public interest and one that is capable of repetition yet evading review, which are two recognized exceptions to the mootness doctrine. *See Delancy v. State*, 356 Ark. 259, 151 S.W.3d 301 (2004); *Cook v. State*, 333 Ark. 22, 968 S.W.2d 589 (1998); *Campbell v. State*, 311 Ark. 641, 846 S.W.2d 639 (1993). Though Britt has since been incarcerated, we agree that this issue is one that will continually become moot before an appeal can be heard due to the availability of prison beds. Violent offenders in the future may well be released on bed-space bonds, which the State contends runs counter to the apposite statute, yet incarcerated before the State has a chance to appeal. Therefore, we hold that the parties are correct and that this appeal, though technically moot, should be heard by this court.

Id. See also Nakell v. Attorney General of North Carolina, 15 F.3d 319, 322 (4th Cir. 1994) (noting that payment of a fine did not render a case moot if it was capable of repetition, yet evading review, as well as disabilities resulting from a conviction). It cannot be said that this is the end of the trial court holding counsel in contempt, or jailing defendants, for refusing to give 48-hours written notice of their constitutional assertion for a trial by jury under the state and federal Constitutions. Further, as noted in *Nakell, supra*, counsel Swindle may suffer collateral consequences, including disciplinary action, if this case is not resolved favorably to him here.

This Court should hear this appeal, and it should reverse the Order appealed from with an Opinion which not only exonerates Appellant Swindle, but also instructs the trial court.

III.

CONCLUSION

This Court should reverse the trial court's order of September 10, 2007, R. 20, Add. 47, and remand this case for a jury trial.

PETITIONER'S PETITION FOR REHEARING IN THE ARKANSAS SUPREME COURT

PETITION FOR REHEARING AND BRIEF IN SUPPORT

Comes now the Appellants, Juan Lux-Lux, and Ken Swindle, and for their Petition for Rehearing and Brief in Support, pursuant to Ark. S. Ct. Rule 2-3:

1. This Court entered its decision on May 29, 2008, *Swindle v. State*, ___ S.W.3d ___, 2008 Ark. LEXIS 381, 2008 W.L. 2205518 (No. CR 07-1281), holding that the trial court order requiring 48-hours written notice of a jury trial request violated a criminal defendant's constitutional rights; however, the Court ruled that it would not consider Appellant Ken Swindle's appeal of the trial court's contempt order against him for violation of that order. By affirming that Order, the Court has refused to review a criminal contempt conviction, which is a Class C misdemeanor, Ark. Code Ann. §16-10-108(b)(1), and will forever remain upon Mr. Swindle's professional and personal record.

2. The Court reasoned that while Appellants' challenge to the Court's pre-trial notice letter was not moot, the contempt conviction against Appellant Swindle was moot since he had served the 24-hours incarceration which was imposed upon him.

3. The Court's reasoning that Appellant Swindle's criminal contempt conviction is moot fails since (a) Appellant was taken involuntarily to jail from the courtroom, and did not assent to incarceration as one

might do in voluntarily paying a fine in some cases; (b) Appellant has a criminal contempt conviction which affects his life from this point on, which is not moot either in his personal life or in his profession as an attorney; (c) Appellant Swindle's constitutional rights were violated since he had entitlement to due process with notice of charges, an entitlement to prepare, a right to present a defense, the right to obtain legal counsel, and entitlement to a jury trial, for which the Appellee had to be proven guilty beyond a reasonable doubt.

4. Appellant Swindle has been denied his legal protections. Ark. Const. Art. II, §§7, 10, 29; U.S. Const. Art. II, §2, Cl. 3; Amend. I, V, VI, and XIV, and Ark. R. Crim. P. Rules 31.2 and 31.3. Appellant, Swindle, was guaranteed the federal rights under the United States Constitution, as applied to the State, under the Fourteenth Amendment. Similarly, the state and federal constitutional rights of Appellant, Juan Lux-Lux, have been violated and other criminal defendants so situated are affected.

5. Appellants incorporate by reference their brief which sets out the applicable law.

6. This Court should rehear this case, and it should reverse the criminal contempt order against Appellant Swindle, yet it should affirm its earlier ruling that the order below is improper and unconstitutional.

WHEREFORE, the Arkansas Supreme Court should grant Appellant, Juan Lux-Lux, and Appellant,

Ken Swindle, the Petition for Rehearing, and ultimately reverse the Order appealed from, of September 10, 2007, R. 20, Add. 47, in its entirety, as well as grant them all other relief to which they may be entitled, including costs and fees.

APPELLANTS' BRIEF IN SUPPORT OF PETITION FOR REHEARING

INTRODUCTION

This Honorable Court ruled that the pre-trial jury trial disclosure requirement of the Trial Court was improper, which was the basis upon which the Trial Court held Appellant, Swindle, in contempt. The order is found in the record at R. 67, Ab. 3 While he had objected to the pre-trial order well in advance of the trial date, R. 10, Add. 6; R. 17, Add. 12; R. 67, Ab. 3, on the day set for trial when Appellant, Swindle, declined to waive his jury trial right for his criminal defendant client, the Trial Court summarily ruled it was "not the way we do things here," and ordered Appellant Swindle jailed, on-the-spot. R. 66-67, Ab. 3-4 It cannot be said that Appellant acquiesced in the incarceration; he was taken away in handcuffs without any opportunity to protest or even hire counsel.

This Court should grant a rehearing in this case because this Court's Opinion erred in ruling that this attorney's criminal contempt conviction is moot. Appellant, Ken Swindle, was summarily found in contempt and taken from the courtroom in handcuffs

after the Trial Court ruled that he failed to comply with its pre-trial jury trial notification requirement which this Court ruled in its decision is unconstitutional. This Court considered that argument but has incorrectly declined to hear Appellant, Swindle's, challenge to his criminal contempt conviction.

This Court should reconsider and vacate its earlier ruling, reversing the Order of the Trial Court of September 10, 2007, in all respects. Alternatively, the Court should reverse and remand for a jury trial. Both state and federal legal authorities are in issue in this case, so the following section lists those in direct issue in this case which should be addressed by the Court upon rehearing, with a substituted opinion.

SUMMARY OF CONSTITUTIONAL AND STATUTORY PROVISIONS APPLICABLE IN THIS CASE

Ark. Const. Art. II, Sec. 3: The equality of all persons before the law is recognized, and shall ever remain inviolate; nor shall any citizen ever be deprived of any right, privilege or immunity . . .

Ark. Const. Art. II, Sec. 7: The right to trial by jury shall remain inviolate, and shall extend to all cases at law . . .

Ark. Const. Article II, Sec. 10: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the county in which the crime shall have been committed

. . . and to be informed of the nature and cause of the accusation against him and to have a copy thereof; and to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to be heard by himself and his counsel.

Ark. Const. Article II, Sec. 29: The enumeration of rights shall not be construed to deny or disparage others retained by the people; and to guard against any encroachments on the rights herein retained, or any transgression of any of the higher powers herein delegated, we declare that everything in this article is excepted out of the general powers of government; and shall forever remain inviolate; and that all laws contrary thereto, or to any other provisions herein contained, shall be void.

United States Const. Art. 3, Sec. 2, Cl. 3: The Trial of All Crimes, except in cases of impeachment, shall be by Jury . . .

United States Const. Amend. I: Congress shall make no law . . . abridging the freedom of speech . . . or to petition the Government for a redress of grievances.

United States Const. Amend. V: No person shall be . . . deprived of life, liberty or property, without due process of law.

United States Const. Amend VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been

committed . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Const. Amend. VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .

United States Const. Amend. XIV: No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ark. Code Ann. §16-10-108: (a) Every court of record shall have power to punish, as for criminal contempt, persons guilty of the following acts and no others:

. . . . (3) Willful disobedience of any process or order lawfully issued or made by it. . . . (b)(1) Punishment for contempt is a Class C misdemeanor.

Ark. R. Cr. P. 31.1: No defendant in any criminal case may waive a trial by jury unless the waiver is assented to by the prosecuting attorney and approved by the court.

Ark. R. Cr. P. 31.2: Should a defendant desire to waive a trial by jury, he may do so by either: (1) personally in writing or in open court, or (2) through

counsel if the waiver is made in open court and in the presence of defendant. A verbatim record of any proceedings at which a defendant waives his right to trial by jury in person or through counsel shall be made and preserved.

SUMMARY OF ARGUMENT

The Arkansas Supreme Court is respectively asked to rehear this case due to grave issues which affect both of these Appellants. This Court's decision will also set a course for trial courts in this state to follow in handling criminal contempt hearings.

Although this Court ruled that the order of which, Appellant, Ken Swindle, he was accused of violating was unconstitutional, this Court declined to hear Appellant, Swindle's, order of contempt. In so doing, this Court failed to consider whether the Appellant, Swindle's, conduct was contemptuous and whether he was denied state and federal constitutional guarantees. All of these issues were previously raised to both the Trial Court and to this Court.

The Trial Court ruled *sua sponte*, from the bench, that Appellant, Swindle, was guilty of contempt. However, the Trial Court, did not notify Appellant, Swindle, of the charge of contempt, or allow Appellant, Swindle, an opportunity to obtain counsel or have a trial before pronouncing judgment on-the-spot. Instead, Appellant, Swindle, was involuntarily taken from the courtroom to jail in handcuffs. Appellant, Swindle, did not voluntarily pay any fine as in cases

cited by the Court in its Opinion. This Appellant's appeal is not moot simply because he served his time in jail. *See Bartley v. State*, 73 Ark. App. 452, 455, 45 S.W.3d 387, 389 (1947) (reversing contempt order despite serving three days before release).

APPELLANT, SWINDLE'S, APPEAL IS NOT MOOT SINCE IT IS FROM A CRIMINAL CONVICTION.

A contempt conviction it is not moot where there are "collateral consequences". *Carafas v. LaValle*, 391 U.S. 234, 237-38 (1968) (noting collateral consequences, including effect upon one's business, voting, serving in a labor union, *et cetera*, which avoids mootness of conviction), and *Accord, Fiswick v. United States*, 329 U.S. 211, 220-222 (1946) (noting possibility of deportation following conviction was sufficient to avoid mootness).

As the widespread publicity associated with this event has taken place in the Northwest Arkansas Community where Appellant, Swindle, practices law, his reputation has been, and will continue to be, tarnished. Further, should Appellant, Swindle, file a motion *pro hac vice* or should he apply to become licensed in another jurisdiction the effects of this conviction will continue. *See generally Leonard v. Hammond*, 804 F.2d 838, 842 (4th Cir. 1986) (citing cases on collateral consequences issue); *United States v. Schrimsher*, 493 F.2d 842, 844 (5th Cir. 1974); *In Re Hatfield*, 658 S.E.2d 871, 874 (2008). In the

present case, the Appellant, Swindle, has collateral consequences from the criminal contempt conviction.

APPELLANT, SWINDLE'S, APPEAL IS NOT MOOT SINCE IT IS FROM A DENIAL OF HIS CONSTITUTIONAL RIGHTS.

A case is not moot simply because a party has already served his time in jail if said service was in violation of the party's constitutional rights. *Bartley v. State*, 73 Ark. App. 452, 455, 45 S.W.3d 387, 389 (1947), (reversing a criminal contempt conviction despite the fact that a defendant had already been incarcerated for three days, where he was held in contempt without notice of the charges and an opportunity to prepare). *See also Taylor v. State*, 76 Ark. App. 279, 281, 64 S.W.3d 278, 282-83 (2001) (noting constitutional right to notice and opportunity to be heard; one day notice was insufficient), and *Accord, Argersinger v. Hamlin*, 407 U.S. 25, 30-31 (1972) (holding that under the United States Constitution one is entitled to a jury trial, notwithstanding that an offense was punishable only up to six months).

Arkansas recognizes that when there are fundamental rights in issue, said rights may not be restricted. *Partin v. Bar of Arkansas*, 320 Ark. 37, 47, 894 S.W.2d 906, 911 (1995) (concerning access to courts). Where a fundamental right, such as access to the courts, is in issue, the standard for review is strict scrutiny. *Ayers v. Norris*, 43 F. Supp.2d 1039 (E.D.

Ark. 1999) (holding statute unconstitutional which limited prisoner access).

CONCLUSION

The Appellants seek rehearing of this case and reversal in all respects of the decision of the Trial Court.